IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. —— 76-1660

TERRELL DON HUTTO, SUB NOM, JAMES MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION; MARSHALL N. RUSH, CHAIRMAN, ARKANSAS BOARD OF CORRECTION; EULA DORSEY, VICE-CHAIRMAN, ARKANSAS BOARD OF CORRECTION; THOMAS H. WORTHAM, M.D., SECRETARY, ARKANSAS BOARD OF CORRECTION; RICHARD E. GRIFFIN, MEMBER, ARKANSAS BOARD OF CORRECTION; AND JOHN ELROD, MEMBER, ARKANSAS BOARD OF CORRECTION ..... *Petitioners*

VS.

ROBERT FINNEY ET AL ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BILL CLINTON
Attorney General
State of Arkansas
ROBERT ALSTON NEWCOMB
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
Attorneys for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. _____

TERRELL DON HUTTO, SUB NOM, JAMES MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION; MARSHALL N. RUSH, CHAIRMAN, ARKANSAS BOARD OF CORRECTION; EULA DORSEY, VICE-CHAIRMAN, ARKANSAS BOARD OF CORRECTION; THOMAS H. WORTHAM, M.D., SECRETARY, ARKANSAS BOARD OF CORRECTION; RICHARD E. GRIFFIN, MEMBER, ARKANSAS BOARD OF CORRECTION; AND JOHN ELROD, MEMBER, ARKANSAS BOARD OF CORRECTION ..... *Petitioners*

VS.

ROBERT FINNEY ET AL ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 6, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 548 F. 2d 740, appears in the Appendix hereto. The opinion of the United States District Court for the Eastern District of Arkansas,

reported at 410 F. Supp. 251, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 6, 1977. A timely petition for rehearing *en banc* was denied on February 3, 1977. A timely petition for extension of time was filed in this Court and Mr. Justice Blackman entered an Order Extending Time to File Petition for Writ of Certiorari to May 25, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Whether Public Law 94-559, The Civil Rights Attorney's Awards Act of 1976, authorized the awarding of attorney fees to be paid by a State, which was not a party to the suit?

II

Whether the Eleventh Amendment to the Constitution absolutely bars the award of attorney fees to be paid by a State?

III

Whether the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the use of indefinite punitive isolation for serious infractions of prison discipline?

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

STATUTORY PROVISIONS INVOLVED

Public Law 94-559, approved on October 19, 1976, states:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as 'The Civil Rights Attorney's Fees Awards Act of 1976.'
>
> Sec. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: 'In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion,

may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.' "

STATEMENT OF THE CASE

The petitioners are the Commissioner of Correction and the Board of Correction for the State of Arkansas. In the district court they were the respondents and in the Court of Appeals they were the appellants. The case involves the constitutionality of the Arkansas Department of Correction. This particular part of the case arose from the hearings held by the United States District after the decision of the Eighth Circuit Court of Appeals in ***Finney*** v. ***Arkansas Board of Correction***, 505 F. 2d 196 (1974).

The Honorable J. Smith Henley, Circuit Judge, sitting by designation in ***Finney*** v. ***Hutto***, 410 F. Supp. 251 (1976), ordered certain changes in the operation of the Arkansas Department of Correction but found many aspects of the operation of the Department of Correction constitutional. The petitioners did not challenge those parts of the district court order setting population ceilings for the institutions, prohibiting the serving of "grue", requiring the hiring of a full-time psychiatrist or psychologist, and requiring a study of the health care system of the Arkansas Department of Correction by the Arkansas Department of Health.

The petitioners sought review in the Court of Appeals of only three parts of the district court order.

In this Court the petitioners seek review of only two aspects of the case. The petitioners contend that the district court exceeded its jurisdiction in a suit brought pursuant to 42 U.S.C. §

1983 when it ordered the State of Arkansas to pay $20,000 to counsel for the petitioners in the district court as attorney's fees. Further the petitioners contend that the use of indefinite punitive segregation as punishment for serious violations of prison discipline does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution. The final contention of the petitioners is that the Court of Appeals erred in awarding counsel for respondents $2,500.00 in attorney's fees for services on appeal.

REASONS FOR GRANTING THE WRIT

I

P. L. 94-559 WAS IMPROPERLY APPLIED IN THIS CASE.

Public Law No. 94-559 (Oct. 9, 1976) provides:

"In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost."

The petitioners respectfully submit that by the plain language of Public Law 94-559 there cannot be an award of attorney's fees made by a United States District Court or a Circuit Court of Appeals against the State. The premise upon which

petitioners rest their argument is that in passing the Civil Rights Attorney's Fees Awards Act of 1976, Congress failed to specifically amend 42 U.S.C. § 1983 to include a State as a party which could be sued pursuant to it.

The petitioners recognize that this Court in ***Fitzpatrick*** v. ***Bitzer***, ___ U.S. ___, 49 L. Ed. 2d 614 (June 28, 1976) held that in a suit brought pursuant to 42 U.S.C. § 2000 ***et. seq***. there was statutory authorization for the award of attorney's fees against a State. It is respectfully contended that ***Fitzpatrick***, supra, is not controlling in the instant case since Public Law No. 94-559 does not expressly contain "threshold . . . Congressional authorization" to allow a state to be named as a defendant in a suit brought pursuant to 42 U.S.C. § 1983. ***Fitzpatrick***, supra, 49 L. Ed. 2d at 619.

42 U.S.C. § 2000 e (a) which was involved in ***Fitzpatrick***, supra, is unlike the Civil Rights Attorney's Fees Award Act in that it expressly provided that those subject to suit include "governments, governmental agencies [and] political subdivisions." Public Law No. 94-559 did not amend 42 U.S.C. § 1983 to include a State as a person subject to the provisions of 42 U.S.C. § 1983.

> "The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in ***Monroe*** v. ***Pape***, 365 U.S. 167, 187-191, 5 L. Ed. 2d 492 (1961) to exclude cities and other municipal corporations from its ambit; that being the case, it cannot have been intended to include states as parties defendant." ***Fitzpatrick***, supra, 49 L. Ed. 2d at 619.

Even though the Court of Appeals in its decision of January

6, 1977, relied on certain language in the legislative history of Public Law 94-559 to support the holding that it authorized the awarding of attorney's fees against a State, the petitioners contend that express statutory language allowing a State to be named as a party in 42 U.S.C. § 1983 actions is needed before this result can apply. Absent clear and convincing statutory language, a State's Eleventh Amendment protection from money judgments prohibits the assessing of attorney's fees against a State.

Citing ***Bradley*** v. ***The School Board of the City of Richmond***, 416 U.S. 696 (1974), and legislative history, the Court of Appeals found that Public Law No. 94-559 applied to this case even though the District Court had made the award of attorney's fees prior to the enactment of the statute.

The petitioners submit that ***Bradley***, supra, is distinguishable from the instant case. In ***Bradley***, supra, this Court dealt with 20 U.S.C. § 1617, which granted authority to a federal court to award a reasonable attorney's fee against a local educational agency, a state (or any agency thereof) or the United States (or any agency thereof) for violations of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment, as they pertained to elementary and secondary education. Because the defendant in ***Bradley***, supra, was a local school board, there was no discussion of a State's Eleventh Amendment protection or the propriety of retroactively applying legislation which would have a direct fiscal impact on a State's treasury. Consequently, the reliance on ***Bradley***, supra, ignores the fact that the State of Arkansas, unlike a local school board, is protected by the Eleventh Amendment.

The petitioners concede that as a general principle newly

enacted legislation governs litigation pending at the time of its enactment unless clear legislative history to the contrary is present. But, in ***Bradley***, supra, 416 U.S. at 711, this Court noted " . . . that a Court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice. . . . " It is respectfully contended that to apply Public Law 94-559 retroactively would be manifestly unjust.

> "The concerns expressed by the Court in ***Schooner Peggy*** and in ***Thorpe*** relative to the possible working of an injustice centered upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." ***Bradley***, supra, 416 U.S. at 717.

The petitioners submit that the impact of Public Law 94-559, if it is applicable in this case, drastically changes the rights of the State of Arkansas and that the right changed by the statute is a constitutional right enjoyed by the State of Arkansas ever since it became a State. The petitioners can conceive of no greater right than one conferred by the Constitution of the United States of America and to change that right is very significant. The impact of Public Law 94-559, if it is applicable to the State, is tremendous in that it directly affects the budgetary and fiscal policy of the State of Arkansas as expressed through the enactments of the Arkanaas General Assembly. To hold that Public Law 94-559 is retroactively applicable to the State of Arkansas would be to create the potential for chaos in the operation of State government. Amendment 13 to the Constitution of the State of Arkansas prohibits deficit spending by the State. Therefore, the payment of attorney's fees by the State of Arkansas requires that money appropriated for other purposes has to be diverted from the purpose intended by the legislature

to satisfy the judgment entered by a United States District Court. The forced reallocation of already appropriated funds is fundamentally unfair to the State of Arkansas and has a serious impact on the right of the Arkansas Legislature to determine how the fiscal affairs of the State are going to be conducted.

Conceding that pursuant to ***Fitzpatrick***, supra, the Eleventh Amendment can be modified by proper Constitutional action, there is no rational basis for allocating to Congress the plenary and nonreviewable power to thwart the Eleventh Amendment retroactively. This is especially true in the instant case, in which (1) there is no specific mention that Public Law 94-559 applies to a State, (2) a State cannot be joined as a defendant under ***Monroe*** v. ***Pape***, supra, and (3) the fiscal consequences to the State of Arkansas are significant. While the protection afforded the States since 1789 by the Eleventh Amendment may now, in some situations, be altered by Congress, due process demands that the States at least be given notice that significant sums in the future will have to be set aside for attorney's fee awards. Therefore, it is respectfully prayed that this Court will grant this petition for a writ of certiorari in order to determine if a State can be made to pay attorney's fees in a case in which it is not a party and whether the protection afforded by the Eleventh Amendment to the Constitution may be retroactively changed. This case is significant since the issues involved concern the relationship between a State and the jurisdiction of a federal district court and a federal court of appeals to order the payment of attorney's fees.

II

THE ELEVENTH AMENDMENT PROHIBITS THE AWARD OF ATTORNEY FEES TO BE PAID BY A

STATE.

The Court of Appeals in affirming the district court's award of $20,000.00 in attorney fees to be paid by the State of Arkansas relied on P. L. 94-559 and the finding of bad faith on the part of the petitioners by the district court. The Court of Appeals stated:

> "Although, in view of the statute, we are not required to pass on the issue of bad faith, the record fully supports the finding of the district court tha the conduct of the state officials justified the award under the bad faith exception enumerated in ***Alyeska Pipeline Service Co.*** v. ***Wilderness Society***, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). ***Finney*** v. ***Hutton***, 548 F. 2d at 742, ftn. 6.

The United States District Court for the Eastern District of Arkansas awarded attorneys' fees to counsel for the petitioners in the sum of $20,000.00. The Court also awarded costs totaling a maximum amount of $2,000.00. The District Court directed that, "these awards are to be paid out of Department of Correction funds." (Page 8, Third Supplemental Decree).

The Department of Correction is an agency of the State of Arkansas created by the first extraordinary session of 1968 of the Arkansas Legislature. (Ark. Stat. Ann. § 46-100 et seq., Supp. 1975). The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by

> citizens of another state, or by citizens or subjects of any foreign state."

While the Amendment does not bar suits against the state by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in federal courts by its own citizens as well as by citizens of another state. See ***Edelman*** v. ***Jordan***, 415 U.S. 651, 662-663 (1974), and cases cited therein. The petitioners contend that the State of Arkansas was not a party to this action, but the order of the District Court awarding attorneys' fees clearly requires that the payment be made from the treasury of the State of Arkansas. (***Finney***, supra, F. Supp. at 285).

> "It is also well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In ***Ford Motor Company*** v. ***Department of Treasury***, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945), the Court said, '[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to envoke its sovereign immunity from suit even though individual officers are nominal defendants.' Id. 464, 89 L. Ed. 389. Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds and the State treasury is barred by the Eleventh Amendment." ***Edelman***, supra., U.S. at 663, L. Ed. 2d at 672-673.

Petitioners submit that the State of Arkansas has not waived its sovereign immunity by operating a prison system, which rightfully can be subject to suits for injunctive relief under 42 U.S.C. § 1983. This court in ***Edelman***, supra, dealt with the

issue of waiver of sovereign immunity and found that:

> "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " ***Edelman,*** supra, 673, L. Ed. 2d at 678 (citations omitted).

Therefore, it is clear that the award of attorneys' fees cannot be predicated on a waiver of the Eleventh Amendment defense by the State of Arkansas solely because it has chosen to operate a prison system. The State of Arkansas clearly has not consented to being sued, and under its Constitution cannot waive the defense of sovereign immunity. The Arkansas Constitution provides, "The State of Arkansas shall never be made defendant in any of her courts." Ark. Const. Art. 5 § 20 (Ark. Stat. Ann. Vol. 1). See also ***Pitcock*** v. ***State,*** 91 Ark. 527, 121 S.W. 2d 742 (1909).

The Circuit Courts of Appeals which have dealt with the award of attorneys' fees subsequent to the decision in ***Edelman,*** supra, have reached conflicting results. In ***Jordan*** v. ***Gilligan,*** 500 F. 2d 701, 705 (6th Cir. 1974), cert. den., 421 U.S. 991, the Court stated:

> "Does a Federal Court have the power to award attorneys' fees against a state or its officials acting in their official capacity in a suit brought under 42 U.S.C. § 1983 to vindicate constitutional rights? To this inquiry we must

> respond in the negative."

Accord, ***Taylor*** v. ***Perini,*** 503 F. 2d 989, 901 (6th Cir. 1975), vacated on other grounds at 421 U.S. 982; ***Skehan*** v. ***Board of Trustees,*** 501 F. 2d 31 (3rd Cir. 1974), vacated on other grounds at 421 U.S. 983; ***Named Individual Members, San Antonio Conservation Society*** v. ***Texas Highway Department,*** 492 F. 2d 1017 (5th Cir. 1974), cert. den., 420 U.S. 926; ***Hallmark Clinic*** v. ***North Carolina Department of Human Resources,*** 519 F. 2d 1315, 1317 (4th Cir. 1974). Contra; ***Jordan*** v. ***Fusari,*** 496 F. 2d 646 (2nd Cir. 1974).

The district court in the instant case based its decision on the principles that attorneys fees can be awarded against the State as ancillary to prospective equitable relief and if the case was litigated in "bad faith". (***Finney,*** supra, 410 F. Supp. at 284 and 285).

Petitioners believe that neither of these theories abrogate the Eleventh Amendment's prohibition against awarding money judgments against an unconsenting state. The petitioners realize that this Court in ***Ex Parte Young,*** 209 U.S. 123 (1908), recognized that injunctive relief can be granted even though it will have a prospective effect on the state treasury. Petitioners' position is that the Circuit Courts of Appeal which have followed the "ancillary effect" doctrine have misinterpreted ***Edelman,*** supra. The term "ancillary effect" as used in ***Edelman,*** supra, came at the conclusion of a paragraph discussing ***Ex Parte Young,*** supra. The phrase was clearly delineated in the following paragraph and cannot be used to support the award of attorneys' fees. This Court stated:

"But the portion of the District Court's decree which petition challenges on Eleventh Amendment grounds goes much further than any other cases cited. It required payment of State funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when the petitioner was under no court-imposed obligation to conform to different standards. While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many respects from an award of money damages against the State. . . . It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Were we to uphold this portion of the District Court's decree, we would be obligated to overrule the Court's holding in ***Ford Motor Company*** v. ***Department of Treasury***, supra. There a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana State officials who were charged with their collection. . . . The term 'equitable restitution' would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax extraction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case." ***Edelman***, supra, U.S. at 668-669, L. Ed. 2d at 675-76.

Therefore, ***Edelman***, supra, clearly establishes that the Eleventh Amendment is a complete bar to the awarding of attorneys' fees against the State since such an award represents a direct levy on the State treasury and has a direct impact on the fiscal affairs of the State of Arkansas.

Petitioners realize that the other ground used by the District Court and the Court of Appeals to award attorneys' fees, "bad faith," is a recognized exception to the normal American rule prohibiting the awarding of attorneys' fees to the prevailing party. ***Alyeska Pipe Line Company*** v. ***Wilderness Society***, 421 U.S. 240 (1975). The "bad faith" exception should not be applicable in a case involving the award of attorneys' fees against a state. Although certain courts have taken the position that ***Sims*** v. ***Amos***, 340 F. Supp. 691, 694 (N.D. Ala. 1972), aff'd, 409 U.S. 942, stands for the proposition that attorneys' fees may be awarded when there is "bad faith" notwithstanding the Elevemtn Amendment, that reliance on ***Sims***, supra, is not well founded. It should be noted that in ***Murgea*** v. ***Massachusetts Board of Retirement***, 386 F. Supp. 179, 182 (D. Mass. 1972), aff'd 421 U.S. 972, a three-judge panel denied attorneys' fees ". . . both as a matter of law, and as a matter of discretion." This case just as ***Sims***, supra, was summarily affirmed by this Court. It should be further noted that except for ***Sims***, supra, all the other cases cited by this Court in ***Aleyska Pipeline Company***, supra, concerning "bad faith" involved parties other than states. Therefore, petitioners respectfully contend that ***Sims***, supra, cannot be considered controlling authority. In discussing the effect of affirmances of three-judge panel decisions this Court in ***Edelman***, supra, U.S. at 670-671 stated:

"This Court, while affirming the judgment, did not in

its opinion refer to or substantively treat the Eleventh Amendment argument. Nor, of course, did the summary dispositions of the three district court cases contain any substantive discussions of this or any other issue raised by the parties. . . . Equally obvious [summary affirmances] are not of the same precedential value as would be an opinion of this Court treating the question on the merits."

The petitioners respectfully request that this Court grant the writ of certiorari and review the question of whether the Eleventh Amendment bars the award of attorneys' fees against a State.

III

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THE SECOND AND FIFTH CIRCUITS ON THE QUESTION OF WHETHER THE USE OF INDEFINITE PUNITIVE SEGREGATION IS UNCONSTITUTIONAL.

The Court of Appeals relied on the Cruel and Unusual Punishment Clause of the Eighth Amendment in affirming the District Court's Order that an inmate not be confined in punitive segregation for a period of not more than thirty days. The test established by this Court on whether a punishment is cruel and unusual is:

> "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." *Gregg* v. *Georgia*, ____ U.S. ____, 49 L. Ed. 2d 859, 875 (1976).

The practice of indefinite sentences to punitive isolation for violation of prison disciplinary rules has been upheld by two Courts of Appeal. In *Sostre* v. *McGinnis*, 442 F. 2d 178, 193 (2nd Cir., En Banc, 1971), it was stated:

> ". . . The Eighth Amendment (does not forbid) indefinite confinement under the conditions endured by *Sostre* for all the reasons asserted by Warden Faollette until such time as the prisoner agrees to abide by prison rules — however, counter-production as a correctional measure, or however personally abhorrent the practice may seem to some of us."

The position of the Court of Appeals in *Sostre*, supra, was reaffirmed in *Mukmuk* v. *Commissioner of the Department of Correctional Services*, 529 F. 2d 272, 277 (2nd Cir., 1976), where the Court said:

> "We have held it permissible to keep a prisoner in segregation until he agrees to abide by the rules of the institution."

The Court of Appeal for the Fifth Circuit in *Novak* v. *Beto*, 453 F. 2d 661 (1971), Rehearing and Rehearing En Banc denied, 456 F. 2d 1030 (1972) noted:

> "There is also, of course, a vigorous debate over the comparative roles of punishment and rehabilitation in the correctional stage of our criminal justice system. It is not our place, however, to resolve that debate. We think it is enough simply to say that, as of now, deterrents and punishment still have an active place in our prisons. It is beyond dispute, of course, that order must be maintained

in the prisons. When a prisoner continues to break prison rules even after losing such privileges as going to the movie and being assigned extra work, the authorities must have some harsh measure to induce compliance with prison regulations."

Our role as judges is not to determine which of these treatments is more rehabilitative than another, or which is more effective than another. The constitution does not answer such questions. The scope of our review is very limited under the cruel and unusual punishment clause." 453 F. 2d at 670.

In describing punitive segregation and the mechanism used for sentencing a person there by the Arkansas Department of Correction the District Court stated:

"An inmate placed on punitive segregation status in the Arkansas Department of Correction does not stay on punitive status without review of whether he should be released or not. A person on punitive status is released when the disciplinary committee decides he is ready for release; (P. 95 of the Transcript in the case of ***Graves and Perry*** v. ***Lockhart***).

"As a general rule, most inmates do not stay in punitive isolation for a period even up to fifteen days. But there are some who are very recalcitrant and hostile, and who refuse, for example, to accept any work assignment, and there is little choice that we simply can't say to them at the end of fifteen days, 'Well, even though you still maintain stoutly that you are not going to work, and you are not going to participate in the programs, we can forgive

all now and you can do what you want to.' It just becomes a question of who is going to run the institution, the inmates or the staff." (P. 47, Vo. 23, ***Holt*** v. ***Hutto;*** testimony of Terrell Don Hutto.)

There was no evidence introduced in the District Court to show a systematic abuse of punitive isolation. Mr. A. L. Lockhart, Superintendent of the Cummins Unit, testified that for the year preceding June 14, 1974, the average stay in punitive isolation had been fourteen days. (P. 94 of the transcript in ***Graves and Terry*** v. ***Lockhart.)*** The appellants respectfully submit that the use of an indefinite sentence to punitive isolation is not cruel and unusual punishment where there is a review and the decision for or against release is based upon valid panel considerations. If an inmate who has been assigned to punitive will not behave during that period of time or still refuses to perform his job assignment, the prison administration should not have to release him, if they did there would be no method of compelling inmates to perform work assignments.

The imposition of the punishment of punitive segregation is not generally the first choice of punishment, except in cases involving major violation of the institutional rules.

"Punitive isolation is ordinarily used as a punishment when reprimands, minor disciplinaries, loss of privileges, suspended sentences, and similar measures have been tried without satisfactory results. It is a major disciplinary measure and will be used when other forms of action prove inadequate, where the safety of others is concerned, or when the serious nature of the offense makes it necessary." (Pgs. 29-30 of Respondents' Exhibit No. 693 introduced in

Finney v. *Hutto.)*

The petitioners respectfully urge that this Court grant certiorari in order to resolve the conflict between the Court of Appeals for the Eighth Circuit and the Courts of Appeal for the Second and Fifth Circuits concerning the question of indefinite punitive segregation as a method of prison discipline.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

BILL CLINTON
Attorney General
State of Arkansas
ROBERT ALSTON NEWCOMB
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
Attorneys for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. —— 76-1660

TERRELL DON HUTTO, SUB NOM
JAMES MABRY ET AL ..... *Petitioners*

VS.

ROBERT FINNEY ET AL ..... *Respondents*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BILL CLINTON
Attorney General
State of Arkansas
ROBERT ALSTON NEWCOMB
Assistant Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201
Attorneys for Petitioners

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 76-1406

ROBERT FINNEY ET AL .....*Petitioners/Appellees*

Vs.

TERRELL DON HUTTO ET AL .....*Respondents/Appellees*

Submitted: December 16, 1976
Filed: January 6, 1977

ROSS, Circuit Judge.

This appeal is the latest chapter in the seemingly endless litigation involving the constitutionality of the Arkansas state prisons.[1] The respondent-appellants are officials of the State Department of Correction. The petitioner-appellees are prisoners confined in Arkansas state prisons. In ***Finney*** v. ***Hutto***, 410 F. Supp. 251 (E.D. Ark. 1976), the district court,[2] pursuant to remand of this court, ***Finney*** v. ***Arkansas Board of Correction***, 505 F. 2d 194 (8th Cir. 1974), held that the

[1]The long history of this litigation may be found in several reported decisions. See ***Holt*** v. ***Sarver***, 300 F. Supp. 825 (E.D. Ark. 1969); ***Holt*** v. ***Sarver***, 309 F. Supp. 362 (E.D. Ark. 1970), ***aff'd*** 442 F. 2d 304 (8th Cir. 1971); ***Holt*** v. ***Hutto***, 363 F. Supp. 194 (E.D. Ark. 1973), ***rev'd in part***, 505 F. 2d 194 (8th Cir. 1974).

[2]Honorable J. Smith Henley, Circuit Judge, sitting by designation.

Arkansas prison system is still unconstitutional in certain respects. The court held, ***inter alia***, that the Department's policy of sentencing inmates to indeterminate periods of confinement in punitive isolation is unconstitutional under the Eighth and Fourteenth Amendments. ***Finney*** v. ***Hutto, supra***, 410 F. Supp. at 278. The court awarded an attorney's fee to petitioners' court appointed counsel in the amount of $20,000 to be paid out of funds allocated to the Department of Correction. The court also ordered the Department to pay the costs of litigation. ***Id.*** at 281-285. The appellants contest these aspects of the judgment entered below. We affirm.

Indefinite punitive isolation.

Judge Henley described the conditions of punitive isolation in the following terms:

> An inmate sentenced to punitive isolation receives a sentence to confinment in an extremely small cell under rigorous conditions for an indeterminate period of time with his status being reviewed at the end of each fourteen day period. While most inmates sentenced to punitive isolation are released to population within less than fourteen days, many remain in the status in question for weeks or months, depending upon their attitudes as appraised by prison personnel. It is rare indeed that a prisoner is confined in a cell by himself. Usually, he must share a cell with at least one other inmate, and at times three or more inmates are kept in the same cell which is equipped with extremely limited facilities. Assuming, and the court is not at all sure that the assumption is valid, that all of the isolation cells are equipped with two bunks, it follows that if three or four men are put in the same cell, and that frequently

> happens, one or two of them are going to have to sleep on the floor.
>
> • • • •
>
> As a class, the convicts confined in punitive isolation or in administrative segregation, for that matter, are violent men. They are filled with frustration and hostility, some of them are extremely dangerous, and others are psychopaths. Confined together under rigorous conditions in the same cell or in immediately adjacent cells, the convicts identify with each other and reinforce each other in confrontation with the custodian personnel, and those personnel in turn identify with each other and reinforce each other in confrontation with the convicts.
>
> • • • •
>
> Inmate violence unavoidably produces a forcible response from prison personnel who may be required to use such things as night sticks and the chemical known as "Mace" to quell disorders. And the court is satisfied that at times the response is excessive, and is further satisfied that many of the episodes of violence that take place in the maximum security facility could be avoided readily if the guards were more professional and used better judgment and common sense in dealing with refractory inmates.

Id. at 275-277. The court concluded that "• • • punitive isolation as it exists at Cummins today serves no rehabilitative purpose, and that it is counterproductive. It makes bad men worse. It must be changed." ***Id.*** Accordingly, the court held, ***inter alia***, that confinement in punitive isolation for more than thirty

days is cruel and unusual punishment and thus impermissible.[3] ***Id.*** at 278.

We affirm this holding on the basis of Judge Henley's well reasoned opinion.

Attorneys' Fees and Costs.

The appellants vigorously contest the attorneys' fee award of $20,000 to be paid out of the funds allocated to the Department of Correction.[4] We affirm the award.

On October 19, 1976, at a time when this case was pending resolution on appeal, the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559 (Oct. 19, 1976), was signed into law. This Act permits an award of a reasonable attorney's fee to the prevailing party in an action such as this brought under 42 U.S.C. §1983. It is clear that Congress intended the Act to apply to cases such as this pending resolution on appeal.[5] Since the

[3]The court carefully noted that the thirty day maximum applies only to punitive isolation, not segregated confinement under maximum security conditions.

[4]This award was attributable to services of court appointed counsel in connection with the ***Holt III*** appeal and the present phase of this litigation. 410 F. Supp. at 282.

[5]During House consideration of the measure, Representative Drinan stated:

> I should add also that, as the gentleman from Illinois (Mr. Anderson) observed during consideration of the resolution on S. 2278, this bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In Bradley versus Richmond School Board, the Supreme Court expressly applied that longstanding rule to an attorney fee provision, including the award of fees for services rendered prior to the effective date of the statute.

Act was passed by Congress under, ***inter alia***, the enabling clause of the Fourteenth Amendment, S. REP. NO. 94-1011, 94th Cong., 2d Sess. 5, the award of attorneys' fees is not barred by the Eleventh Amendment. ***Fitzpatrick*** v. ***Bitzer***, 44 U.S.L.W. 5120, 5123 (U.S. June 28, 1976) (Nos. 75-251 & 75-283).

The appellants complain that the district court erroneously forced the Department to pay the fee in view of the fact that the Department is not a named party. We disagree. The Act permits an order, as was entered in this case, requiring the award to be paid directly from the funds of a state agency, such as the Department of Correction, whether or not the agency is a named party. S. REP. NO. 94-1011, ***supra*** at 5.

The petitioners, as private attorneys general, have vindicated the constitutional rights of Arkansas state prisioners. The award is thus justified under Public Law No. 94-559.[6] Furthermore, in view of the protracted nature of this litigation, the results obtained by the petitioners, and other factors enumerated in ***Johnson*** v. ***Georgia Highway Express, Inc.***, 488 F. 2d 714, 717-719 (5th Cir. 1974), the $20,000 award is reasonable.

122 Cong. Rec. 12, 160 (daily ed. Oct. 1, 1976) (remarks of Representative Drinan). ***Bradley*** v. ***Richmond School Board***, 416 U.S. 696 (1974) involved the issue whether §718 of the Education Amendments of 1972, which granted authority to federal courts to award a reasonable attorneys' fee in school desegregation cases, applied to a case where the propriety of the fee award was pending resolution on appeal when the statute became law. The Supreme Court held that it did. ***Id.*** at 710-724. Thus Representative Drinan's reference to the ***Bradley*** case is strong evidence that Congress intended this statute to apply to fee awards pending resolution on appeal.

[6]Although, in view of the statute, we are not required to pass on the issue of bad faith, the record fully supports the finding of the district court that the conduct of the state officials justified the award under the bad faith exception enumerated in ***Aleyska Pipeline Service Co.*** v. ***Wilderness Society***, 421 U.S. 240, 258-259 (1975).

The appellants also attack the award of costs which is to be paid by the Department of Correction. This award is both permissible under the Eleventh Amendment, ***Fairmont Creamery Co.*** v. ***Minnesota,*** 275 U.S. 70, 73-74 (1927), and reasonable.

The petitioners' court appointed counsel awarded $2,500 for their services on this appeal.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

ROBERT FINNEY
(Lawrence J. Holt),
et al, PETITIONERS

v. NO. PB-69-C-24 and Related
and Consolidated cases.

TERRELL DON HUTTO,
Commissioner of
Correction, State
of Arkansas, et al. RESPONDENTS

THIRD SUPPLEMENTAL DECREE

Pursuant to the Memorandum Opinion[1] this day filed herein, IT IS BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED:

[1]Future references to "Opinion" are to the Memorandum Opinion that is being filed contemporaneously with this Decree and that is mentioned above.

General

This Third Supplemental Decree supplements the court's original Decree in subject litigation and the court's Supplemental Decree filed herein on December 30, 1971, and the court's Second Supplemental Decree filed herein on August 13, 1973.

This Decree is applicable to Case No. PB-69-C-24, Robert Finney (Lawrence J. Holt), et al, Petitioners v. Terrell Don Hutto, Commissioner of Correction, State of Arkansas, et al, Respondents, and to all other cases that are related to and have been consolidated with the case just mentioned.

The terms "petitioners" and "respondents" are defined as in the Supplemental Decree of December 30, 1971.

All prohibitions and directives contained in previous decrees herein, save to the extent that they have become obsolete with the passage of time or are modified or superseded by this Decree, are confirmed and reiterated.

Overcrowding and Confinement of Inmates in Maximum Security Cells.

The over-all inmate capacity of the Cummins Unit of the Arkansas Department of Correction will be, and the same hereby is, fixed at 1650, and the over-all inmate capacity of the Tucker Intermediate Reformatory administered by the Department of Correction will be, and the same hereby is, fixed at 550.

Respondents will be, and they hereby are, enjoined from holding more than 1650 inmates in custody at one time in the Cummins Unit and from holding more than 550 inmates in

custody at one time in the Tucker Unit.

With the exception of the East Building at Cummins, referred to in the court's Opinion, the capacities of individual housing units at both Cummins and Tucker set out in the report filed with the court and reflecting housing conditions existing on November 12, 1975 will be, and the same hereby are, approved at least for the time being. Respondents are hereby enjoined from exceeding those capacities, except that in emergency situations the capacities may be exceeded temporarily to a limited extent and for short periods of time.

The term "maximum security cells" means the individual cells used at Tucker for the confinement of inmates in "administrative segregation" and "punitive isolation," and all of the cells in the East Building at Cummins.

Respondents will be, and they hereby are, enjoined and restrained from confining more than two persons in any maximum security cell at the same time, and two persons are not to be confined in the same cell at one time unless each of such persons is provided with a bunk and a mattress on which to sleep at night; Provided, that in cases of serious emergencies involving large numbers of violent or unruly inmates more than two persons may be confined in a single maximum security cell for no longer than is absolutely necessary to terminate the emergency. If it is found necessary to confine more than two persons at one time in a maximum security cell for more than forty-eight hours, the facts and circumstances of the confinements must be reported to the court, and the burden of justifying the confinements will be upon the respondents.

Health Care and Malingering

Respondents will be, and hereby are, mandatorily enjoined and directed as soon as practicable to cause a new study to be made by the Arkansas State Board of Health of on-station medical facilities and services at both Cummins and Tucker, and to comply with reasonable recommendations and suggestions resulting from the study. The scope of the study should extend to the areas mentioned at page 18 of the court's Opinion of even date to which reference is hereby made, and to such other and additional areas as may seem appropriate.

If respondents do not already have an adequate arrangement with other state agencies whereby off-station care can be provided to inmates at medical facilities in Little Rock, Arkansas, in cases in which adequate care cannot be supplied at the Jefferson County Hospital in Pine Bluff, Arkansas, respondents will be, and they hereby are, directed and required to undertake to negotiate such an arrangement at the earliest possible date. Respondents are referred to the court's discussion of this matter appearing on page 18 of the Opinion.

In the field of mental health care, the court now approves of the group therapy program which the Department has instituted and which is described in the court's Opinion. However, respondents will be, and they hereby are, mandatorily enjoined to employ as soon as possible one or more full time psychiatrists or clinical psychologists to diagnose, evaluate the cases of, and treat where practicable individual inmates who are suffering from mental diseases or impairments or serious emotional disturbances, and to supply such employees with adequate quarters and facilities for the efficient performance of their duties. Compliance with this portion of the Decree is not to

await completion and activation of the proposed prison hospital in Pine Bluff.

Respondents will be, and they hereby are, enjoined from finding guilty or punishing any inmate for malingering, that is to say, feigning illness or injury to avoid work, unless the disciplinary committee, or panel thereof, sitting on the inmate's case, shall first have consulted with the doctor or other person who examined the inmate and shall have determined that the examiner or examiners of the accused inmate was or were of the opinion that the accused inmate was malingering on the occasion in question. (See pages 20-21 of the Court's Opinion.)

Mailing and Visiting Regulations and Legal Assistance to Inmates.

The court now approves as constitutional existing regulations relating to inmate correspondence and visitations from relatives and friends, and also approves as constitutional the legal assistance that is available to inmates, including legal assistance from other inmates.

Rehabilitation.

The Court approves as constitutionally adequate the rehabilitation programs now available in the Department.

Inmate Safety.

The court approves as constitutionally adequate existing arrangements and facilities designed to protect the safety of inmates while confined in the Department.

Race Relations and Black Muslims.

To the end that relations between the races at the several institutions administered by the Department may be improved, and that racial discrimination against inmates who are members of minority racial or ethnic groups, or the appearance of such discrimination, be eliminated from the Department, respondents will be, and they hereby are, directed and required to continue and to intensify their efforts to promote blacks who are now employed by the Department and to recruit more black employees, and to install blacks, where practicable, in positions of meaningful authority in the prison system. Respondents are referred to the court's suggestions in this connection appearing on pages 35-36 of the Opinion.

The directive set out in the preceding paragraph does not in any way modify or detract from the court's positive prohibitions against racial discrimination in any form appearing in other decrees of the court in this litigation.

As to Black Muslims, in addition to the court's previous prohibitions of discrimination against any inmates on account of their religion, respondents will be, and they hereby are, enjoined from offering to Muslims against their will pork in any form as an item of diet and from serving to Muslims any food items that have been cooked in the fat or grease of pork or that have been contaminated otherwise by contact with pork or its by-products. This prohibition extends to Muslims confined in maximum security cells, as heretofore defined, as well as to Muslims who are confined in general prison population.

Brutality.

Previous decrees herein enjoining brutality practiced toward or upon inmates by prison personnel will be, and hereby are, extended so as to specifically enjoin any and all officers or employees of the Department of Correction from verbally abusing or cursing inmates and from using racial slurs or epithets when addressing or talking with inmates.

Disciplinary Procedures.

At pages 45-49 of the Opinion the court discussed existing disciplinary procedures within the Department. As indicated in the discussion, the court finds that those procedures meet federal constitutional standards and hereby approves them, subject to the proviso that no complaining employee or charging officer is to sit on a disciplinary committee or panel considering a complaint or charge made by the employee or officer in question. Such participation by a complaining or charging employee of officer will be, and it hereby is, enjoined.

Punitive Isolation.

Respondents will be, and they hereby are, enjoined from sentencing inmates of the Department to confinement in punitive isolation for indeterminate periods of time. In the future an inmate who is convicted of a major disciplinary infraction may be sentenced to confinement in punitive isolation for a period of not more than thirty days; at the end of that maximum period he must be returned to general population, or, if it be found necessary, he may be held in a segregated statu: under maximum security conditions other than punitive. No disciplinary committee or panel is required to sentence an inmate

to confinement in punitive isolation for as much as thirty days, and the Superintendent of the institution or the Commissioner is free to release an inmate from punitive isolation at any time prior to the expiration of his sentence.

Inmates who have been confined in punitive isolation for more than thirty days when this Decree is filed are to be released to population or held in maximum security but under conditions that are not punitive. Inmates who have not been confined in punitive isolation for thirty days or longer will be considered as serving sentences of not more than thirty days. In determining whether an inmate has been in isolation for thirty days or longer, the two day periods of "interruption" mentioned in the Opinion will be included in the calculation.

Respondents will be, and they hereby are, enjoined from supplying inmates confined in punitive isolation with food and water inadequate in quantity and quality to preserve their health, and are further enjoined from serving such inmates diets which differ qualitatively from food supplied to inmates in general population. Without limiting the generality of the foregoing, the use of the substance known as "grue," or any variant thereof, as a food for inmates in punitive isolation is specifically enjoined.

Respondents will be, and they hereby are, directed and required to afford inmates in punitive isolation reasonably adequate opportunities for physical exercise outside their cells, including reasonable amounts of outdoor exercise when weather permits.

The East Building at Cummins.

Lest there be any mistake about the matter, respondents will be, and they hereby are, enjoined from confining in any cell in any of the three wings of the East Building at Cummins, in circumstances other than exceptional and then for only short periods of time, more than two men at the same time, and respondents will be, and are, required to provide each man so confined with a bunk and mattress.

Respondents will be, and they hereby are, directed and required to evaluate and periodically re-evaluate the cases of inmates confined in what the court has called the "third wing" of the East Building (Opinion page 60) as prescribed on pages 62-64 of the Opinion, and to take appropriate actions based on such evaluations and re-evaluations.

Attorneys' Fee, Expenses and Costs.

The court now awards counsel for petitioners the sum of $20,000.00 as an attorneys' fee on account of services performed by them in this litigation since the remand resulting from *Finney* v. *Arkansas Board of Correction*, 505 F. 2d 194 (8th Cir. 1974). The court also directs that counsel be reimbursed for the reasonable and necessary expenses paid or incurred by them, including the expenses of employing law students to assist in the preparation of the case, since the remand, but not to exceed $2,000.00. Counsel should be able to agree on the amount of the expenses; if not, they can take up the matter with the court. These awards are to be paid out of Department of Correction funds.

As to costs, the court not incorporates hereinto by reference

what it had to say on the subject in its Opinion at pages 75-76.

Procedural Details and Directions to the Clerk.

The court now retains jurisdiction of this cause for all appropriate purposes including but not limited to consideration and disposition of individual inmate claims. Respondents are directed to file a progress report in conformity with the requirements appearing at page 78 of the Opinion.

The court's Opinion and this Decree dispose of the class claims presented in this litigation; they do not dispose of the individual claims. As provided by Fed. R. Civ. P. 54(b), the court now expressly determines and finds that there is no just reason for delay in filing this Decree and now orders that it be filed forthwith so that if either side desires to appeal from the court's disposition of the class claims, such may be done without awaiting disposition of the individual claims.

The Clerk is now directed to file the original of the Opinion and of this Decree in Case No. PB-69-C-24. Copies of the Opinion and Decree will be considered as having been filed in each of the cases consolidated with the case just mentioned; copies of the Opinion and Decree will be filed physically in any other of the consolidated cases upon the request of any party.

Finally, respondents are reminded that in its Opinion and in this Decree the court has been concerned with minimum federal constitutional requirements. That the court has approved certain improvements that have been made as satisfying those minimum requirements should not be taken as an indication that the court necessarily thinks that from the standpoint of

penology or prison administration or perhaps from other standpoints there are not additional improvements that ought to be made. And respondents should keep in mind that a practice or condition that is constitutionally tolerable today and under present conditions may not be so considered at some future date and under other conditions.

Dated this 19th day of March, 1976.

/s/ J. Smith Henley
J. Smith Henley
United States Circuit Judge
Sitting by Designation

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

ROBERT FINNEY
(Lawrence J. Holt),
et al. PETITIONERS

VS. NO. PB-69-C-24 and
Related and Consolidated Cases.

TERRELL DON HUTTO,
Commissioner of
Correction, State
of Arkansas, et al. RESPONDENTS

HENLEY, Circuit Judge, Sitting by Designation.

These consolidated cases are now before the court pursuant to the mandate of the Court of Appeals in ***Finney*** v.

Arkansas Board of Correction, 505 F. 2d 194 (8th Cir. 1974), reversing the decision of this court in ***Holt*** v. ***Hutto,*** 363 F. Supp. 194 (E.D. Ark. 1973),[1] and remanding the litigation for further proceedings. The remand requires the court to inquire again into the federal constitutionality of practices and conditions existing and prevailing in the principal penal institutions administered by the Arkansas Department of Correction, an agency of the State of Arkansas.

Petitioners are Arkansas convicts who have been convicted of felonies in the circuit courts of the State and who are now confined in the Department. The principal respondents are Correction Commissioner Terrell Don Hutto, the members of the Arkansas State Board of Correction, A. L. Lockhart, Superintendent of the Cummins Unit of the Department, and R. G. Britton, Superintendent of the Tucker Intermediate Reformatory. Jurisdiction is predicated upon 28 U.S.C. 1343 (3) and 42 U.S.C. 1983.

Pursuant to the remand extensive hearings have been held,[2] add in mid-August, 1975 the court accompanied by court personnel and counsel on both sides visited the principal units of the Department and also visited the new Reformatory for Women which was then nearing completion in the City of Pine

[1]The court has written three "Holt" opinions dealing with the Arkansas prison system. The opinion above cited is frequently called "Holt III." Holt I appears as ***Holt*** v. ***Sarver,*** 300 F. Supp. 825 (E.D. Ark. 1969). Holt II appears as ***Holt*** v. ***Sarver,*** 309 F. Supp. 362 (E.D. Ark. 1970), aff'd, 442 F. 2d 304 (8th Cir. 1971).

[2]The hearings extended from January through early July, 1975. Initial hearings were conducted by the court personally. Later hearings were by agreement held before a United States Magistrate, and the testimony heard by him was taken, transcribed, and filed as depositions in the case. In a final hearing conducted by the court personally the testimony of certain expert witnesses were taken in connection with a mental health program recently adopted by the Department.

Bluff, Arkansas.

The cases before the court are in part class actions brought by and on behalf of inmates of the Department generally, and in part individual complaints of particular inmates. In view of the large number of complaints that have been consolidated, this opinion will be confined to the class claims in which petitioners seeks for themselves and other inmates similarly situated declaratory and injunctive relief with respect to alleged institutional conditions and practices which they claim deprive inmates of rights protected by the Constitution of the United States. Inmate claims of personal deprivations, including claims for money damages, will be dealt with later. The cases collectively will generally be referred to herein as "the case" or as "this litigation."

The Department administers three principal institutions and a number of recently established off-stations. The principal units are the Cummins Unit, a maximum security farm type prison located in Lincoln County, Arkansas; the Arkansas State Reformatory for Women located on the Cummins property; and the Tucker Intermediate Reformatory located in Jefferson County, Arkansas. The off-stations are the Alcoholic/Narcotic Rehabilitation Center located on the grounds of the Benton State Hospital a little more than twenty miles from Little Rock, Arkansas, a Work Release Center and a Pre-Release Center also located at the Benton State Hospital; the Blytheville Work Release Center located in Mississippi County in the northeastern part of the State; and the Department of Correction Livestock Production Center located near Booneville in Logan County in northwestern Arkansas.

No claims has been made that any unconstitutionalities exist in any of the off-stations. While the Women's Reformatory is involved in the case to some extent, the court is principally concerned with conditions and practices at Cummins and Tucker.

In approaching the issues before it the court recognizes that it should not embroil itself unreasonably in the affairs of the Department; in areas of prison administration and security, the classification of inmates, prison discipline, and the like, much must be left to the discretion of the prison administrators. The court is concerned ultimately with constitutional deprivations, and if it finds that such deprivations exist or have existed, the court has the power to intervene and devise appropriate relief. See, ***Kelly*** v. ***Brewer***, 525 F. 2d 394, 399 (8th Cir. 1975), and the numerous cases therein cited.

Overcrowding

The court first considers whether the principal units of the Department are now overcrowded to the point of unconstitutionality. The matter was discussed in ***Finney*** v. ***Arkansas Board of Correction***, supra, 505 F. 2d at 200-02.

As to the Women's Reformatory, the court found, on the basis of its own observation of that facility in August, 1975, and of the fact that the new Women's Reformatory had still not been completed and put into use as of mid-February, 1976, that the institution was hopelessly overcrowded. And on February 18, 1976 the court entered an order directing that the institution be closed and the inmates transferred or release not later than June 30 of the current year.

Since that order was entered, Commissioner Hutto has indicated compliance with it and has stated publicly that the June

30 deadline will give the Department no trouble. The court hopes that the new Reformatory will be completed and put into use substantially before June 30.

Turning now to Cummins and Tucker, the court recognizes at the outset that the serious overcrowding of a prison operates adversely on inmate safety, morale, and welfare, on the security and good order of the institution, and on the administration of the prison in general. The question of whether a prison is overcrowded to the point of unconstitutionality involves more than determining how many square feet of living space are allocated to individual inmates. Regard must be had to the quality of the living quarters and to the length of time which inmates must spend in their living quarters each day; further some small housing units although cramped may be more comfortable and livable than more spacious quarters.

The question of overcrowding actually involves two questions; First, is the institution as a whole overcrowded? Second, are individual housing units within the institution overcrowded? In other words, the question is not only how many inmates are housed in the prison but also how the prison population is distributed throughout the institution.

Roughly speaking, Cummins houses about three times as many inmates as does Tucker, and, as a class, the Cummins inmates are older men and more hardened criminals than are the inmates of Tucker.

In both Holt I and Holt II the court found that both of the institutions in question were seriously overcrowded, and that the overcrowding constituted a serious threat to inmate safety, particularly when considered in connection with the trusty

guard system which was still in use when Holt II was decided in 1970. As of that date the population of Cummins had been declining for some time, and amounted to somewhat less than 1,000 men; at the same time Tucker was housing about 325 inmates.

In those days the basic housing units for inmates at both institutions were large, dormitory type barracks, which are still in use. Each barracks contained, and still contains, about 5,000 square feet of floor space, and each has a maximum capacity of not more than 100 men. Additionally, at Cummins there was a separate building which contained a number of isolation cells. At Tucker there were two rows of small cells reserved for persons who had been condemned to die and who were awaiting execution.

By 1973, when Holt III was decided, the Cummins population had grown to about 1200 and that of Tucker had grown to about 349. The basic housing units were still the barracks, and each barrack probably had more than 100 men in it. The old isolation cells at Cummins had been abandoned in favor of a new maximum security facility commonly referred to as the East Building. At Tucker the "death cells" had ceased to be used as such, and were being used to hold prisoners in "administrative segregation" or in "punitive isolation." That was the condition that the Court of Appeals found to be unconstitutional in ***Finney***. The holding of that court was based in part on the testimony of Commissioner Hutto that the barracks could not "be successfully operated with more than 60 to 80 inmates," 505 F. 2d at 201, whereas in truth and fact the respective barracks were housing from 125 to 135 men.

When the 1975 hearings were held, the overcrowding at

both institutions was worse than it was in either 1973 or 1974. The population at Cummins had grown to 1518 and that at Tucker had grown to 501. According to Mr. Hutto, the population growth was not attributable to any defect or malfunction of the Arkansas parole system, but solely to the fact that inmate intake began to exceed releases about the first of 1974.

The 1975 record reflects a difference between the testimony that Mr. Hutto gave about barrack capacity in 1973 and that which he gave in 1975. In 1973 he had said that there should not be more than 60 to 80 men in a given barrack; in 1975 he raised that figure to 100. He expalined the difference by saying that when he was testifying in 1973 he had convenience of administration, rather than overcrowding, in mind, and that as far as overcrowding is concerned, each barrack can properly house 100 men without loss of administrative efficiency. However that may be, the fact remains that as late as the date of the court's August, 1975 inspection of the prison all of the barracks at both Cummins and Tucker had substantially more than 100 men in them, and inmates who could not be housed in the barracks and who were not in the East Building at Cummins or in the administrative segregation-punitive isolation cells at Tucker, were being housed in facilities that were not designed originally for the housing of inmates.

A report filed with the court and which is a part of the record reflects conditions as they existed on November 12, 1975. That report reveals that since August, 1975 the overcrowded conditions at both Cummins and Tucker had been alleviated substantially as a result of a number of factors.

To start with, in the late summer and early fall of 1975 the rate of inmate discharges began to exceed the rate at which new

inmates were being received at the prisons. As a result of this trend, the population of Cummins had declined to 1451, and that of Tucker had gone down to 486.[3]

In the second place a modern minimum security building equipped with cells for single occupancy had been largely completed and put into active use.

And finally the Department had been able to acquire and install a large number of house trailers to provide housing for some 12 inmates per trailer.

However, the report reflects that 27 inmates of Cummins were being housed in a gymnasium area, and that 57 inmates who were not ill were being housed in part of the infirmary facilities. And the report also shows that at Tucker a substantial number of inmates were being housed temporarily in what had been a part of the commissary facility.

The November report reveals that the Department estimates that the capacity of Cummins is 1638 men, and that the capacity of Tucker is 632 men. Those capacity figures are based on 100 men for each of the large barracks and 12 men for each of the house trailers. The Cummins figures show four minimum security "pods" with a capacity of 62 men each, and another minimum security building with a capacity of 62 men. The Cummins figures also show continued use of the gymnasium area with a capacity of 30 men, part of the infirmary building

[3]Shortly after directing the closing of the Women's Reformatory, the court made a personal inquiry of Commissioner Hutto as to the current population of Cummins and Tucker in mid-February of the current year and was advised that the downward trend in the populations of both institutions had continued, and, further, that the population of the Women's Reformatory was lower than it had been in November, 1975.

with a capacity of 59 men, the infirmary proper with 25 beds, and the "dog kennel" with a capacity of six men.[4] The Cummins report also reflects that East Building has a capacity of 120 men. The report indicates that at Tucker all of the inmates are housed in the large barracks, the house trailers, and the maximum security unit, which unit has a rated capacity of 28 men, the "dog kennel" with a four man capacity, and the eight bed infirmary.

If the occupancy figures appearing in the report and the capacity figures appearing therein are both accepted as correct, it appears that on November 12, 1975 Cummins was occupied to the extent of about 89% of capacity, and that Tucker was occupied to the extent of about 77% of capacity.

Those total figures, however, do not tell the whole story, and it is necessary to consider how the total population of the two prisons are distributed among the individual housing units in each institution.

While none of the large barracks at Cummins had as many as 100 men in it on November 12, 1975, not one of the eight had less than 94 inmates. There were 99 inmates in one barracks, 98 in another, 97 in a third, 96 in four and 94 in one. One of the minimum security "pods" with a capacity of 62 men had not been completed and was housing no inmates. One of the completed "pods" was filled to capacity, and the other two had 61 and 60 inmates respectively. The report also indicates that the trailer complexes are not being used to an extent approaching capacity. Each complex contains six trailers that are used to house inmates, and, as stated, the rated capacity of each trailer

[4]The dog kennel is the building where the prison bloodhounds are kept. The building has certain living facilities in which inmate dog handlers are housed.

is 12 men. In November the number of occupants in the respective trailer complexes varied from 59 to 54; thus, the highest rate of occupancy was about 81% and the lowest was 75%.

With particular regard to the East Building, the report shows a capacity of 120 men and an occupancy of 111, or an occupancy rate of some 92%. But the East Building figures, as set out in the report, overlook the fact that the building has three wings, each of which should be considered as a separate housing unit. What imbalance or imbalances exist among the separate wings, the court does not know.

In any event, the court is not willing to accept the proposition that the East Building over-all has a capacity to house 120 maximum security inmates without overcrowding. While the report describes the building as containing mainly two to four men cells with some cells being isolation cells, Respondents' Exhibit #654 which is a slick paper brochure describing the East Building and prepared by the architects and engineers who designed it, seems to indicate that the cells in the building were actually designed to house only one prisoner each. In Holt III the court was not disturbed by the idea that two men were being housed in the same cell in the East Building, but the court now finds that frequently the cells have been used to house three or four men at a time with the men being required to use a single wash basin and toilet. And when one of the cells is used to house more than two people, one or more of them has to sleep on the floor. Regardless of what the theoretical capacities of the cells may be, the court finds that the East Building, or particular units thereof, has been chronically overcrowded and that something must be done about the situation.

At Tucker the distribution of inmates last November

among individual housing units was more encouraging than at Cummins, and the large barracks were not nearly so crowded. The most densely populated of the four barracks was C Barracks, and it had only 81 men in it on November 12, 1975. Of the 16 house trailers, four were filled to capacity; three had 11 occupants; four had ten inmates each; one had nine; one had eight; and two had seven. One trailer had no occupants.

The disparities of occupancies among the individual housing units appear to the court to be due in large measure, if not principally, to the policy of the Department to assign men to living quarters on the basis of their job assignments. That policy is understandable from the standpoint of security and convenience of administration, but it can bring about the overcrowding of particular units, and it does not contribute to the efficient use of living space, as such.

While ordinary inmates do not spend all of their waking hours or even most of them in their living quarters, they do sleep there and spend most of their non-working time in their quarters where they have essentially no privacy. Living in the barracks at Cummins or Tucker is not nearly as dangerous for an inmate as it was some years ago. However, incidents of violence do occur in the barracks, and two men have been murdered in barracks by other inmates since the court visited the prisons last August. It should be said, however, that the first of those two killings broke the Department's very enviable record of not having had an inmate killed by another inmate since 1971.

The court has given very careful consideration to this aspect of the case. Assuming at least for purposes of argument that Cummins and Tucker were not unconstitutionally over-

crowded in November of last year or in February of this year, and assuming that they are not overcrowded today either from the standpoint of the over-all institutions or from the standpoint of individual housing units, the fact remains that they have been seriously overcrowded in the recent past, and unless prevented the overcrowding may recur.

The problem has long-term and short-term solutions. The housing of convicts in parts of gymnasiums or infirmaries or in essentially short-term housing units such as house trailers, is not an acceptable long-term solution. Long-term the problem can be solved only by replacing the existing main buildings at Cummins and Tucker, which contain the old barracks, and which are old and outmoded, by modern and adequate housing facilities, or by reducing prison populations as by dispersing inmates to off-stations or by constructing one or more smaller prisons conveniently located. That Mr. Hutto and the Board of Correction may favor the latter approach is indicated by Mr. Hutto's testimony last summer that no additional construction at Cummins is contemplated and that it is not felt that Cummins should be a larger institution than it now is.

There is very little, if anything, that the court can do immediately about long-term solutions to the housing problem. As to the short-term solution, the court finds and concludes that the maximum population at Cummins should not exceed 1650 inmates, and that the maximum population at Tucker should not exceed 550, and the decree to be entered will freeze the maximum populations at those numbers. Additionally, respondents will be required generally or in circumstances other than exceptional not to exceed the unit capacities set forth with respect to the various individual housing units, other than the East Building, set forth in the report of November 12, 1975. The

court recognizes, of course, that in emergency situations unit capacities may have to be exceeded to some extent for limited periods of time. The court will deal specifically with the East Building in a later section of this opinion.

Medical Services and Health Care

A state owes to its convicts a constitutional duty to provide them reasonable and necessary medical and surgical care, and this duty extends to the field of mental health and also to other fields of health care. ***Finney*** v. ***Hutto***, supra; see also ***Seward*** v. ***Hutto***, 525 F. 2d 1024 (8th Cir. 1975). The existence of this duty was recognized by the Arkansas penal system as early as ***Talley*** v. ***Stephens***, 247 F. Supp. 683 (E.D. Ark. 1965).

On the other hand, except in cases of emergencies, the need or desire of an inmate for medical service at a particular point in time must be balanced against legitimate institutional interests of the prison administration.

The Arkansas Department of Correction furnishes its inmates both on-station and off-station health care. The on-station care is provided by a full time physician employed by the Department who divides his time between Cummins and Tucker and who also treats female inmates of the Women's Reformatory. The doctor is assisted in his work by paramedical personnel at both Cummins and Tucker, whom the court considers to be adequately qualified to perform the tasks appropriate to their professions. Infirmaries, including pharmacies, are maintained at both Cummins and Tucker. The court finds that the infirmaries are reasonable well equipped and are adequate to provide ordinary types of care reasonably to be expected in a prison infirmary. No one claims that the infirmaries are hospitals or that they are equipped as such.

The Department also provides its inmates with somewhat rudimentary dental care which is administered by two part time dentists. The care appears to be limited to the filling and extraction of teeth and the furnishing of prison made dentures. The equipment at Cummins and Tucker appears to be adequate for the limited uses to which it is put.

When an inmate is admitted to the Department, he is given a physical examination which includes an examination of his eyes. Inmates are advised that if they develop eye complaints while in the institution, they should follow regular sick call procedures. If an inmate needs glasses, they are supplied, and the initial furnishing is gratis. If an inmate loses his glasses through carelessness or neglect, he may be required to pay for a replacement. Since most inmates are indigent and opportunities for an inmate to earn money legitimately while in the Department are quite limited, it may be difficult if not impossible for an inmate to pay for a new set of glasses. The court doubts that the on-station facilities at either Cummins or Tucker are adequate to detect eye diseases or conditions such as cataracts or glaucoma, particularly at the early stages of development.

Contagious diseases can create problems for any prison, and the matter of the spread of contagious diseases is closely connected to the sanitary conditions of the institution. A common ailment of prison inmates is infectious hepatitis, and while fortunately there has not been to the court's knowledge a serious epidemic of hepatitis in the Department, there are and have been many cases of it. Likewise, there has been some apprehension about the incidence and possible spread of tuberculosis in the Department. As far as tuberculosis is concerned, the record

contains detailed descriptions of the steps that are being taken by the Department in cooperation with the Arkansas Department of Health to detect the disease, to treat it and to render it non-communicable if it appears in an inmate. The courts finds that the sanitary conditions that prevail in the Department are reasonably satisfactory on the whole, but there are some improvements that ought to be made, and a particular effort should be made to keep flies out of the prison buildings, including kitchens and dining areas. Naturally, the incidence of flies varies substantially with the seasons; and flies may be able to get inside the buildings to a greater extent during the days on which there is an unusual amount of activity in the buildings than on ordinary days.

For many years inmates who required off-station care were transported to Little Rock where they were treated and hospitalized, if need be, at the Arkansas State Hospital which is located in close proximity to the University of Arkansas School of Medicine and to the University Medical Center, including University Hospital.

In August of last year following the closing of the hearings that have been described, the Department for reasons not appearing of record seems to have terminated its arrangement with the State Hospital and to have supplanted it with a contract with the Jefferson County Hospital in Pine Bluff under the terms of which the Hospital, which is publicly owned, will provide compensated in-patient hospital services to inmates of the Department who may be sent there from the prisons. That care is administered by physicians and surgeons engaged in private practice in Pine Bluff and who are willing to participate in the program. The contract is terminable at the will of either party.

Transportation between the units of the Department and the Hospital is now provided by ambulances owned by the Department and stationed at both Cummins and Tucker. Pine Bluff is much closer to Cummins than is Little Rock and is somewhat closer to Tucker. Until last summer, the Department owned no ambulances.

The arrangement between the Department and Jefferson County Hospital is not intended as a permanent one. The Department now has under construction a hospital of its own in Pine Bluff located near the new Women's Reformatory that has been mentioned. This hospital when completed will be in all respects a modern, up-to-date and fully equipped and staffed hospital facility. It will not only provide medical and surgical care for inmates but will also serve as a reception and evaluation center for all new inmates. The staff will include one or more psychiatrists or clinical psychologists.

The Department hopes to have this new hospital completed and in operation by 1977. However, the court's experience with the construction of the Women's Reformatory causes it to be somewhat skeptical about target dates for the completion of Department construction, particularly in view of the fact that much of the work is done by prison labor.

The court will observe, as it has done in the past, that many of the inmates of the Department suffer from serious mental and emotional illnesses and disturbances. Historically, the Department has done nothing for those people except treat them with drugs, and send violent inmates to the State Hospital to be held temporarily until their periods of violence subside or are brought under control. Until very recently the Department has never had any systematic mental health program for in-

mates; nor has the Department ever employed a full time psychiatrist or psychologist although it has has from time to time the benefit of part time services of members of those professions who ave not had any meaningful opportunity to engage in any extended counselling with or treatment of disturbed inmates.

Last year the Department adopted and put into limited operation a group therapy program designed to aid inmates having correctible character or emotional defects. This program was devised and its practice is taught by the Asklepieion Foundation of Carbondale, Illinois and is sometimes called "AF." Mr. Hutto testified at some length about the program, and the court personally heard a good deal of expert testimony about it on the final day of the 1975 hearings. The program is closely akin although not identical to transactional analysis, and the witnesses expressed great hopes for it as applied to convicts.

The court thinks that the establishment of the program in the Department is certainly a step in the right direction and that it should be extended to the extent feasible if it appears to be getting results. However, the program is probably not suited to all inmates, and it should not be used to the automatic exclusion of other programs of mental health that may show promise. Nor does the court think that the initiation of a program or programs of group therapy takes the place of regular psychiatrists or psychologists to be used in diagnosing, evaluating and endeavoring to treat individual inmates by conventional methods of individual psychotherapy.

Getting back to the subject of on-station care and the adequacy of the facilities and services available at Cummins and Tucker, it appears to the court that the Court of Appeals in reaching its adverse decision on this phase of the case was in-

fluenced in substantial measure by the results of a study that was made in 1972 by the Arkansas State Department of Health at the request of the Board of Correction. The report of the results of the study pointed out many serious deficiencies in the health care offered by the Department and was discussed at some length in ***Finney*** v. ***Arkansas Board of Correction,*** supra, 505 F. 2d at 202-04.

Since that report was made, there have been numerous and substantial improvements at both Cummins and Tucker, but the court thinks that remediable deficiencies probably still exist. It has been some four years since the study was conducted, and the court is going to direct the Department to request that another study be made as soon as practicable. The Department will be expected to follow any reasonable suggestions that the Health Department may make. The study requested should not be limited to the adequacy of personnel and equipment at the prisons, but should also extend to the adequacy of on-station services offered and to such things as sanitary conditions at the prisons and the adequacy of the means being taken to prevent or control the spread of contagious diseases, including tuberculosis.

The existing arrangement between the Department and the Jefferson County Hospital is not ideal. The Hospital was not designed as a prison hospital; it is not under the control of the Department or any other agency of the State itself, and the doctors practicing therein are not state employees. Moreover, the court is not willing to permit the Department entirely to sever its connection with perhaps more advanced facilities and services that may be available at Little Rock. The court thinks it probable that the Department in fact has a contingency arrangement with the State Hospital or the Medical Center

whereby inmates can have the benefit of facilities and services that may be available at those institutions and which may not be available at Pine Bluff. If no such contingency arrangement exists, the Department will be expected to undertake to negotiate one as soon as possible.

What has just been said is not to be taken as a disparagement of the Jefferson County Hospital or of the physicians who practice in that hospital or as a disapproval of the existing contract. The court is simply not willing to permit the Department to rely entirely on the Pine Bluff facility to provide off-station care that inmates may need.

As has been said, the court thinks that the Department should now proceed to employ on a full time basis one or more psychiatrists or psychologists for the purposes that have been indicated, and to provide adequate quarters and facilities for the work of the new employees. Those requirements will be made.

With regard to inmate access to available health care services the court finds that the Department has no custom or policy of denying necessary care to any inmate who needs it, and further finds that inmate access to the prison physician and to the infirmaries and their personnel is reasonably adequate. Regular sick calls and "pill" calls are made at both Cummins and Tucker each day. A sick call is made by paramedics at the East Building each day, and the prison physician visits the East Building once a week.

It is true that in some isolated instances inmates may have been denied treatment improperly or may have not been given proper treatment. Such isolated instances, however, would

appear to be the result of nothing but administrative or professional error, and they do not result from any departmental policy. Of course, it ought to be unnecessary to point out that it is absolutely impermissible for any Department employee deliberately to refuse to treat an inmate or to deny him prescribed medication for reasons of spite or as a means of retaliation or punishment for misconduct.

To the extent that individual inmates complain that on particular occasions they have been denied treatment or medication, the court thinks that such claims can be dealt with adequately when the court considers the individual claims for relief that are before it.

Before concluding this section of this opinion, the court desires to deal to some extent with the problem of malingering by inmates. Unless they are physically or mentally disabled, inmates of the Department are expected to work, and many of them are required to work hard and for long hours. Some inmates will feign illness to avoid work, and some will go as far as to injure themselves to avoid duty. This tendency of inmates to shirk work by feigning illness creates a real problem for the prison administration, and malingering is quite properly a major disciplinary offense and may be punished severely.

There is one aspect of the problem, however, that gives the court some trouble. Inmates can and do become ill on occasion while at work. If an inmate complains of illness while working in the fields, for example, and expresses a desire to go to the infirmary, his request will ordinarily be granted by his supervisor and he will be transported to the infirmary from his place of work. But, when the inmate asks to be taken to the infirmary in such circumstances he runs the risk of being charged with

malingering unless the doctor or the paramedic who examines him finds that he is sick enough to be put to bed or at least to receive an excuse from working for the remainder of the day. If the inmate is so charged and found guilty, he may be confined in punitive isolation, or may lose good time or be reduced in classification, or he may be subjected to a combination of those sanctions.

The court recognizes that an inmate may go to work on a particular day and later pretend to be ill in order to obtain at least a brief respite from labor while being carried to the infirmary, and that this gives a problem to those in charge of inmate work crews. But, an inmate who becomes ill or honestly thinks that he is sick should not be discouraged from seeking medical attention by fear of being exposed to a major disciplinary proceeding should the person who examines him conclude that there is nothing serious the matter with him.

The court thinks that the problem can be solved, at least in part, by providing that before an inmate can be found guilty of malingering by a disciplinary committee or a panel thereof, the committee or panel must consult with the doctor or other person who examined the inmate and determine that in the opinion of the examiner the accused inmate was in fact a malingerer on the occasion in question. The mere fact that the inmate in question was returned to his place of work without being put to bed or given a "lay-in" for the day is not enough automatically to justify a conviction. The decree to be entered will so provide.

Rehabilitation

Unlike the situation that existed in 1973, the rehabilitation picture within the Department is now quite bright, and the

court finds it free of constitutional deficiencies.

With the possible exception of the livestock operation at Booneville, all of the off-stations mentioned in an earlier portion of this opinion were established in 1975, and their rehabilitative value is obvious.

In 1973 the Arkansas Legislature established the Department of Correction School District, and the educational program offered by that district is comparable to the program available in the public schools of the State. If a trustworthy inmate completes his high school education while an inmate of the Department, he can arrange to pursue his education at the college level if he desires to do so. The educational program, which is available to all inmates of the Department, was discussed in some detail by the court in ***Rutherford*** v. ***Hutto***, 377 F. Supp. 268 (E.D. Ark. 1974), to which opinion reference is now made.

In addition to the educational program available to female inmates of the Department, those inmates are being trained in ceramics and in other areas. Hopefully, when the women are moved into their new institution rehabilitative opportunities will be broadened further.

Extensive vocational training is available at both Cummins and Tucker. An inmate at Cummins may be trained in the repair of farm equipment and furniture, in upholstering, welding, building maintenance, and "graphic arts." A Tucker inmate may be trained in the repair of automobile bodies, in the tuning up of automobile engines, welding, woodwork and drafting.

The graphic arts program at Cummins deserves particular mention. It teaches offset printing and perhaps other forms of duplication, and inmates who have completed the course and have been released have been quite fortunate in finding jobs in which their newly developed skill can be employed.

Finally, although the health care provided by the Department has been criticized, it appears to the court that a good many inmates emerge from the Department in better physical condition than they were in when they were received as inmates, and that in itself has rehabilitative value.

Regulations as to Mail and Visitors

The Department's regulations relating to inmate mail which gave the Court of Appeals trouble, 505 F. 2d at 210-12, were promulgated prior to the decision of the Supreme Court in *Procunier* v. *Martinez*, 416 U.S. 396 (1974). Since that decision the regulations, which appear as part of Chapter IV of the January, 1975 edition of the Department's Inmate Handbook, have been revised. The court finds that the revised regulations are quite liberal and comply with constitutional requirements.

Regulations dealing with visits between inmates and members of their families and friends also appear in Chapter IV of the Handbook, and they appear to the court to be reasonable and appropriate.

Legal Assistance to Inmates

The opinion in *Finney* deals in part with the adequacy of legal assistance available to inmates, and this court was directed to "re-examine procedures relating to inmate assistance to

satisfy the alternative requirements of *Johnson* v. *Avery*, 393 U.S. 483. . . (1969)." *Finney* v. *Arkansas Board of Correction*, supra, 505 F. 2d at 213.

The court finds that the legal assistance available to inmates, including assistance rendered by fellow inmates, at times called "writ writers," is and has been adequate, and that the Court of Appeals may not have been advised fully in this area.

As to inmate assistance to other inmates, the court knows full well that writ writers have functioned freely and without hinderance in the Department for years, and that the representation to the contrary made to the Court of Appeals by one of the appellants in *Finney* was simply false.[5]

The Court of Appeals was also not fully informed as to the status and function of the Legal Adviser to Inmates. The Legal Adviser is a full time employee of the Department, and is a licensed lawyer. His services are available without charge to inmates of all of the units of the Department. The Adviser is in a position to serve and does serve inmates in numerous fields, and the statement that the Adviser "is not permitted to assist the prisoners in civil litigation," 505 F. 2d at 213, is not an accurate one.

It is true that the Adviser is not in a position to represent inmates who wish to file § 1983 petitions seeking relief against

[5]The representation in question was made in connection with one of the appeals of James G. Ellingburg, which appeals were consolidated with the appeal in *Finney* proper. See 505 F. 2d at 213. Ellingburg is himself a notorious prison writ writer and prepared many petitions both for himself and other inmates while confined in Cummins from about 1972 until his release in the summer of 1975. As the court recalls, Ellingburg handled his own appeals, and the representation in question is not to be attributed to counsel for petitioners in *Finney*.

their keepers. But he can and does represent inmates in civil proceedings generally, including proceedings for post-conviction relief either in the Arkansas state courts or in the federal courts. That the efforts of the Adviser have not been unsuccessful in habeas corpus context is demonstrated by the recent decision of this court and of the Court of Appeals in ***Sanford*** v. ***Hutto***, 394 F. Supp. 1278 (E.D. Ark.), aff'd, 523 F. 2d 1383 (8th Cir. 1975). See also, ***Bumgarner*** v. ***Lockhart***, 361 F. Supp. 829 (E.D. Ark. 1973).

Before leaving this subject the court will point out that apart from the assistance of the Legal Adviser to Inmates and of fellow inmates, Arkansas convicts who can afford to do so are always free to employ counsel of their choice, and that indigent inmates are entitled in proper cases to judicially appointed counsel in connection with either civil or criminal proceedings in the state or federal courts.

The court recognizes that if the legal assistance to be given by one inmate to another is to be effective, the inmate giving the assistance must have reasonable access to some library facilities. Law libraries have been purchased at both Cummins and Tucker. The court has inspected them and finds them adequate for inmate use and that access to them is reasonably available subject to restrictions which are not inappropriate.

Inmate Safety

In this section of the opinion the court will discuss the question of whether the Department is exercising ordinary care for the safety of inmates from abuse and violence at the hands of other inmates, and the question of whether living conditions at Cummins or Tucker are so unreasonably dangerous to inmates

as to make confinement in either of those institutions unconstitutional.

The questions have been stated as above because it may be doubted that any prison is a "safe" place for an inmate to live. Regardless of how well constructed, organized, and administered a prison may be, incidents of violence of various kinds, including homosexual violence, are going to occur from time to time. And the court has already mentioned the killing of two inmates by other inmates since August of last year.

In the very nature of things a state cannot be held to be an insurer of the safety of the inmates of its penal institutions. But the state does owe to convicts the duty to use ordinary care for their safety, and a state cannot be permitted to maintain a penal institution in which conditions are so dangerous that the inmates must exist in dread of imminent injury or death inflicted by other inmates.

In years past an ordinary inmate of the Department, referred to then as a "ranker," was in almost constant danger from other rankers, and he was also in danger of being killed by armed inmate guards. His danger of attack from other rankers was enhanced by the fact that the trusty guards would do little or nothing to protect him, and that the inmate floorwalkers assigned to patrol the barracks at night were of little, if any, value as far as inmate safety was concerned.

In Holt II the trusty guard system (and other aspects of the trusty system) was held to be unconstitutional and was ordered to be phased out with the trusties being replaced by civilian personnel.

By the time of Holt III the trusty guards had been replaced except for a few armed inmates who were stationed in the towers and the inmate dog handlers who were armed when the prison bloodhounds were being used in pursuit of an escaped convict or a criminal.[6]

The court finds that at the present time the Department uses no armed inmates as guards or in any other capacity, including the handling of dogs. Thus, an inmate today is in no danger of death or injury at the hands of another inmate in whose hands a weapon has been placed by the Department.

In the course of the hearings counsel for petitioners suggested in their examination and cross-examination of witnesses that the continued use of inmate floorwalkers to patrol the barracks at night was a relic of the old system, and that it should be prohibited. The court does not agree.

The floorwalkers are unarmed and have no authority with respect to the inmates over whom they are supposed to watch. While the court doubts, as it has doubted in the past, that the floorwalkers are of much protection to sleeping inmates, they are not a source of danger to inmates; their presence may have some deterring effect on the "creepers" and "crawlers" mentioned in Holt II, and according to Commissioner Hutto and Superintendent Lockhart they serve certain other useful purposes as well.

[6]The court will note at this point that the bloodhounds used by the Department are not "guard" or "attack" dogs. They are not vicious; they are not trained to pursue or attack human beings but simply to follow human scent. When a dog is working, he is under the immediate physical control of the handler. Bloodhounds such as those used by the Department can be, and are, used not only to track fleeing criminals and escapees, but also to track lost or missing persons, including children.

What has just been said about the floorwalkers who operate in the barracks is generally applicable to the inmate turnkeys who are stationed outside the doors of the respective barracks.

The actual guarding of inmates from other inmates is now done by civilian guards who are always stationed outside the barracks and who can readily come to the assistance of any imperilled inmates. And inmates who are working in the fields are under the guard of free world personnel who are in a position to come to the help of an inmate who is threatened or assaulted by a fellow convict.

Further, regardless of what may be thought about conditions in the East Building at Cummins, a subject that will be reached in due course, the fact remains that the authorities at Cummins have been able to use the building to remove from general population a number of inmates who ordinarily would live in barracks and who would constitute a particular source of danger to other inmates.

The two killings that have taken place in recent months occurred after the record in the case was closed, and the circumstances of the killings have not been developed in the evidence.

While those incidents and other non-fatal incidents that have doubtless occurred are highly regrettable, the court finds that all in all officers and employees of the Department have done a reasonably good job in the field of inmate safety over the past three or four years, and the court does not find that the Department is failing to use ordinary care for inmate safety, or that either Cummins or Tucker is today such a dangerous place

for an inmate to live as to raise a constitutional problem as far as inmate safety in itself is concerned.

Race Relations in General

As is well known, social conditions existing in a given community at a given time are apt to be reflected in its prisons. And if a social problem is of a kind that can arise in prison, it is almost sure to do so and probably in exacerbated form due to the very nature of prison life. No one questions that race relations constitue a major social problem all over the United States today, and it is not surprising to find that the problem exists in prisons all over the country, and the institutions operated by the Arkansas Department of Correction are no exceptions. Indeed, the problem of race relations at both Cummins and Tucker is perhaps the most vexing one to beset the Department, and it manifests itself in a number of areas of prison life and administration.

In discussing certain prison practices and conditions race relations can be ignored up to a point, and the discussions appearing in the preceding sections of this opinion have not made any particular reference to race. However, when one approaches such areas as prison discipline, alleged brutality practiced upon inmates, inmate classifications, and job assignments, racial consists of inmate population and prison staffs cannot be overlooked, nor can there be overlooked the effect that racial attitudes and prejudices may have, or be alleged to have, on relationships between inmates and between inmates and prison officers and employees.

Race relations, whether in a prison or somewhere else, depend ultimately on the subjective feelings of the people involved.

As long as the subjective feelings involved are no more than feelings, no federal constitutional problem is presented. Where, however, those feelings manifest themselves objectively in words, actions, or policies in prison context, constitutional deprivations can result.

Racial attitudes in this country have developed over a very long period of time, and in many people are so deep seated that the persons holding them are not actively conscious that they exist and influence their objective conduct. Thus, a white prison employee may discriminate against black inmates without being really conscious that he is doing so. The reverse of that proposition is also true. Moreover, a member of a minority racial or ethnic group who believes that he is a member of a class that has been systematically discriminated against by members of a dominant majority may see discrimination where none exists. Further, a member of a minority, including a convict, may seek to excuse his own failings, incapacities, or shortcomings by claiming that he has been the victim of racial discrimination when such is not the case.

It is probably unnecessary to say that when one deals with race relations in the Arkansas Department of Correction, one is dealing with members of the Negro and the Caucasian races. If other racial or ethnic groups are represented in the Department at all, the number of their members is so small as to be insignificant.

Negroes in Arkansas are in a substantial minority when compared with the population of the State as a whole. In the Department of Correction, however, black inmates make up nearly one-half of the total prison population and have done so for as long as this court has been familiar with the Arkansas

prison system.

Administration of the Department, on the other hand, is clearly under the control of white people. Although in recent years the Department has employed a substantial number of blacks and is trying to hire more, a large majority of the employees are white, and Negroes occupying positions of any real authority are very few indeed.

Regardless of the fact that at Cummins, and presumably at Tucker as well, one finds a number of black employees bearing titles such as Captain, Lieutenant or Sergeant, it appears to the court that the only black person who occupies a position of any real authority in the administration of the prison system is Ms. Helen Carruthers, the Superintendent of the Women's Reformatory. And the court will say at this point that she has done an excellent job with a racially mixed female population in spite of the difficulties, including overcrowding, under which she has been required to work.

Prior to the Department's voluntary integration of Tucker and prior to the integration of Cummins pursuant to the decision in Holt II, the court had no real occasion to consider race relations in the Department apart from the question of segregation itself. However, in Holt III the court had urgent occasion to discuss those relations and did so in several contexts. See ***Holt*** v. ***Hutto,*** supra, 363 F. Supp. at 201-05 and 214.

In Holt III the court found that race relations in the Department were bad, to say the least, and the Court of Appeals certainly did not disagree with that findings. ***Finney*** v. ***Arkansas Board of Correction,*** supra, 505 F. 2d at 206 and 209-10.

Most of what the court had to say in Holt III by the way of criticism of the Department in the field of race relations is still valid today, and the court sees no occasion to repeat those statements here in any detail. While conditions in the Department have probably improved somewhat over the last two years and several months, the court finds that in spite of Departmental regulations and memoranda designed to improve race relations and to eliminate or mitigate the effects of poor race relations, the relations between whites and blacks are still bad at both Cummins and Tucker, particularly at the former institution. And the court further finds that the poor relations are still due to the factors that the court found causative in Holt III, namely a paucity of blacks in positions of real authority that are meaningful to inmates in their day to day prison life, the low caliber of the inmates in general, including black inmates, and the poor quality and lack of professionalism of the lower echelons of prison employees who are in close and abrasive contact with inmates every day.

On the positive side, the court thinks that the members of the Board of Correction, Commissioner Hutto, and Superintendents Lockhart and Britton are conscious of the problem and are working toward at least a partial solution, although in candor the court doubts that race relations as such, will ever be any better in the Department than they are in the free world; and that observation is as applicable to any prison in the country as it is to the Arkansas Prisons.

One hopeful sign is the establishment of the rehabilitative programs that have been described. If they do nothing else, such programs tend to ameliorate the rigors and harshness of prison life, and that amelioration in itself would seem to have a tendency to improve relations between inmates and prison personnel

regardless of race. Moreover, providing ignorant or illiterate black inmates with what amounts to a public school education should tend to upgrade them and qualify them for better assignments and a better life inside the prison as well as in the outside world.

Conversely, systematic training of prison employees is calculated to improve their general competency and professionalism, to make them aware of racial attitudes and problems, and to equip them better to deal with inmates of a race other than their own. And it appears from the record that training programs for employees of the Department have been instituted and are being prosecuted.

Respondents' Exhibit No. 687 is a copy of the Department's "Affirmative Action Plan" which was initiated in March, 1974 and which was approved in February, 1975. The plan indicates that the major concern of the Department has been to promote blacks already hired by the Department, and that since March, 1974, out of 198 promotions, 64 or 32.32% have gone to blacks.

The plan further reflects that since March, 1974, the Department has terminated 260 persons of whom 61 or 23.46% were black, whereas during the same period of time the Department hired 274 people, 78 of whom or 28.47% were black. Thus, the hiring of blacks has been in excess of black terminations percentagewise.

According to the plan, new employees are hired without regard to race and entirely as a result of referrals by the Arkansas Employment Security Division, and the plan recites that prior to the utilization of the ESD as a referring service applica-

tion forms used by the Department did not refer to race. The plan states that between August 30, 1973 and June 30, 1974 the Department's black work force was increased by 2.4%, and that during the period between March, 1974 and May, 1975 the black work force increased by 5.1%.

While the progress reported in the plan is commendable, and while the plan is doubtless sufficient to serve the purpose for which it was formed, and while it has evidently gained the approval of the governmental agency, the approval of which was required, the court doubts that it really reaches the problem that is involved here.

This is not a fair employment practices case. The question is not whether the Department is discriminating against blacks in matters of hirings, promotions, or discharges, but whether the recruitment and promotional policies of the Department are designed to correct or alleviate the racial imbalance of the Department's staff which has contributed so much to the difficulties that the Department has had in the area now under consideration.

What the Department needs to do is not to hire people without regard to race but to make a conscious effort to hire qualified blacks in additional numbers and to place them in positions in the institutions which will enable them to exercise some real authority and influence in the aspects of prison life with which black inmates are primarily concerned.

The Department needs more blacks who are in positions that will entitle them to sit on classification committees and on disciplinary panels, to counsel with inmates about their problems, and to supervise inmates while at work. This need

was recognized by this court in Holt III, and it was recognized by the Court of Appeals in ***Finney***, 505 F. 2d at 210.

To illustrate that need: Many of the disciplinary problems of the Department arise in the prison fields where large numbers of black inmates work as members of prison "hoe squads" or "garden squads." An examination of Respondents' Exhibit No. 659 reveals as of June 11, 1975 the field security force at Cummins consisted of a Field Major, a Field Captain, three Field Lieutenants, and fifteen "Correctional Officers II." The major, the captain, and the lieutenants were all white, and of the fifteen correctional officers twelve were white. On the other hand, Respondents' Exhibit 658 reflects that on June 10, 1975 282 inmates were assigned to hoe squads; 54.9% of those inmates were black. The same exhibit shows that on the same date 137 inmates were assigned to the garden squads; 52.5% of those inmates were black. In such a situation racial difficulties, including claims of discrimination, are certain to arise, and they do.

There is no constitutional objection, of course, to the Department's using the ESD as a referring service, but the exclusive use of that agency is not apt to produce applicants the hiring of whom will meet the Department's need to correct the existing racial imbalance of the staff.

The court recognizes, as it has recognized in the past, that it is difficult to recruit blacks who are qualified and willing to hold responsible positions in the Department; a number of factors are involved, including the rural location of the prisons. But the court is not satisfied that Commissioner Hutto and others connected with recruiting prison personnel have really exerted themselves to the fullest extent possible or have exhausted their

resources as far as hiring responsible blacks is concerned.

There is nothing to indicate that the Department's need in this connection has been made known generally to the black population in Arkansas through advertising or otherwise, or that anyone connected with the Department has sought to enlist the good offices of the University of Arkansas at Pine Bluff, which is a predominantly black institution of higher learning and which used to be an all black college, or that help has been sought from such agencies or organizations as the Urban League or the National Association for the Advancement of Colored People, or from any governmental agencies concerned with the welfare of minorities.

Such approaches to the problem might not turn out to be fruitful, but at least they should be explored. Respondents will be directed to make further efforts in the field of black employment and in that connection to give consideration to the court's suggestions although the court is not going to command that any particular suggestion be followed.

In this section of the opinion the court has undertaken to discuss race relations in the Department in a general way. The court will now proceed to examine other specific prison problems. The problems to be considered will include racial discrimination per se and other problems in which race is involved to a greater or lesser extent.

Racial Discrimination

The racial discrimination now to be considered is alleged discrimination by white prison personnel against black inmates. At this time at least, "reverse discrimination" is not any real

problem in the Department.

In a prison which is controlled by white people and in which large numbers of black inmates are confined, opportunities for racial discrimination against the blacks exist in a number of principal fields, namely: inmate classification, including promotions to a higher class or demotions to a lower class, job assignments, disciplinary proceedings, and punishments imposed for infractions of prison rules.

The general subject was considered by this court in some detail in Section II of its opinion in Holt III, supra, 363 F. Supp. at 202-05, and the ***Finney*** court considered it as well, 505 F. 2d at 209-10. The court has reviewed what it had to say in Holt III in the light of the opinion of the Court of Appeals and in the light of the evidence developed in 1975, and finds that it has nothing really substantial to add to what it said in 1973, taking into consideration the fact that there probably has been some improvement in race relations at the prisons since Holt III was decided.

As indicated in Holt III, racial discrimination is not officially countenanced by the Department and is specifically prohibited by its rules and regulations. As it found in 1973, the court now finds that there is no hard evidence that overt discrimination is being practiced in the Department, although many black inmates think or claim to think that they have been the victims of discrimination. But again as in 1973 the court has the feeling that in instances racial discrimination that is covert and perhaps even unconscious is still going on, and that it is going to continue to go on until such time as the Department itself is adequately integrated along the lines laid down in the preceding section of this opinion.

In its Second Supplemental Decree filed in connection with its Holt III opinion the court specifically enjoined racial discrimination in any form and in all significant areas of prison life, and the court does not consider that additional injunctive relief in connection with the problem is necessary or would be helpful at this time.[7]

Grievance Procedure

A viable grievance procedure in a prison ought to serve to alleviate a number of prison problems, including claims of racial discrimination. The value of such a program generally has been recognized by the Court of Appeals for this circuit in ***Willis*** v. ***Ciccone***, 506 F. 2d 1011 (8th Cir. 1974), and in the later case of ***Mason*** v. ***Cicone***, __F. 2d__ (No. 75-1104 8th Cir. Feb. 17, 1976).[8] Where such a procedure exists, it can be used to settle expeditiously many inmate grievances without requiring the inmates involved to resort to time consuming litigation which places extremely heavy burdens on the courts, prison administrators, and attorneys. As the law now appears to stand, a state prisoner is not required to exhaust administrative remedies, including grievance procedures, before seeking judicial relief under § 1983. That is not to say, however, that if a state establishes an adequate grievance procedure and administers it fairly and properly, the federal courts might not be inclined at some future date to require the exhaustion of the procedure before the inmate may have his grievance heard in the courts.

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[7]The court will note at this point that this is not a contempt proceeding in which prison officials are sought to be held liable for violations of previous decrees or orders of the court.

[8]Both of those cases involved federal convicts who were inmates of the Medical Center for Federal Prisoners at Springfield, Missouri. A federal prisoner complaining of prison conditions or personal mistreatment can obtain by means of a petition for a writ of habeas corpus essentially the same relief available to a state prisoner in a §1983 proceedings.

The record in this case reflects that in 1974 the Department initiated a formal grievance procedure which is set out in detail at pages 12-14 of the Inmate Handbook. If an inmate with a grievance is not able to obtain relief from his immediate supervisor, he may carry his grievance to the Administrative Review Officer. If that officer does not solve the problem satisfactorily, the inmate is entitled to review by an "Institutional Review Board," consisting of the Superintendent of the institution and two high ranking staff members. The grievance may be carried still further to the "Department Review Committee" and ultimately to the Board of Correction itself. Provision is made for having the grievance considered by impartial people, and it is expressly provided that unless the inmate makes false statements in the prosecution of his grievance, he is not to be subjected to any sort of retaliation for having invoked the grievance procedure.

Mr. Lockhart testified that some use of the procedure has been made at Cummins, and that some grievances have been adjusted satisfactorily. Of course, if inmates will not use a grievance procedure, it is valueless, and they will not use it unless they believe that there is a reasonable possibility of obtaining relief by means of it.

Apart from any formal grievance procedure, the court thinks that the higher echelon officials of the Department should be more available to inmates than perhaps they are, and should keep themselves personally familiar with day to day life in the prisons including the work activities of inmates.

The Black Muslims

The Department has a number of black inmates who are

members of the Black Muslim religious sect. Some of those inmates claim that they are subjected to religious discrimination along with or apart from racial discrimination.

The Muslims in the Department fall broadly into two groups, namely, Muslims who abide generally by prison rules and regulations and who live in general prison population, and Muslims who are more or less consistent rule violators and trouble makers and who spend at least large portions of their time confined under maximum security conditions, principally in the East Building at Cummins. This section of the opinion will deal with the Muslims who live in population, but what is said here will not be irrelevant to the conditions of Muslims in the East Building.

The problem of the Muslims in general population was considered by the court in Holt III, 363 F. Supp. at 202-03. The court found that the claims of the Muslims were not without substance, although the court did not find that Department personnel were intentionally discriminating against Muslims as such, and that much of the problem arose from the fact that the prison administrations were simply unaware of what the problems of the Muslims were. The court found that the administration was willing to meet reasonable Muslim demands, and that for the most part the problem of the Muslims could be handled administratively. However, in its Second Supplemental Decree the court specifically enjoined the respondents from discriminating against the Muslims on account of their religious beliefs or the teachings of their religion. And the *Finney* court took notee of this court's action in that regard. 505 F. 2d at 209.

The court finds that today the Muslims are not unduly restricted in the exercise of their religion. They can hold

meetings as can members of other religious sects, the services of Muslim clergymen are not denied to them, and they are free to receive generally circulating Muslim publications.

As it was in 1973, the principal problem of the Department's Muslims today is dietary. As is now generally known, Muslims eschew the consumption of pork in any form; they are not permitted by their religion to eat pork, nor are they permitted to eat any food which has been cooked in pork grease or that has been contaminated otherwise by coming into contact with pork. Unfortunately for the Muslims, pork is frequently served as a food item in the Department, and a good many of the vegetables served to inmates are cooked in pork grease.

The court finds that the Department has made and is making a conscientious effort to supply the Muslims with a pork free diet and to advise Muslim inmates in connection with each meal what dishes they can eat without danger of being contaminated. However, the Muslims are not fully satisfied because in the last analysis they do not trust the Department's cooks and food handlers, including non-Muslim employees and non-Muslim inmates assigned to work in the prison kitchens. And the Muslims fear that they may unwittingly consume food that is taboo to them on religious grounds.

The court does not think that there is much that it can do to remove this distrust by means of further injunction or otherwise. However, the court will enjoin the Department from serving pork to Muslims against their will and from exposing them to food that has been contaminated by contact with pork or pork grease or lard made from pork fat.

Due in part to the small number of Muslims in the Depart-

ment, the court is not going to order that special kitchens be established for the Muslims or that only Muslims be employed in the preparation of food for the Muslims. Assuming that Muslims will work in a kitchen in which pork is being used as an item of diet or a cooking ingredient, the court thinks that it would he helpful if Muslims were assigned to the kitchens, and the court thinks that in any event non-Muslim kitchen personnel should be properly supervised to prevent the overt or covert, direct or indirect, serving of pork to the Muslim inmates.

While the court does not deem it necessary to order the steps to be taken, it might not be amiss for Commissioner Hutto to arrange to have the prisons inspected by free world Muslims and to get their ideas and suggestions about the conditions from the standpoint of religion under which their co-religionists are confined.

Brutality

The court will now take up the claim of inmates in general population that they are unconstitutionally subjected to brutality, including verbal abuse, cursing, and the like, by prison personnel. This section of the opinion will be limited to class claims of inmates in general population; similar claims of inmates confined under maximum security conditions will be treated in other portions of this opinion, and individual claims of specific instances of brutality will be dealt with within the framework of individual complaints.

The history of brutality in what is now the Department of Correction is a long one and it has been discussed in detail by judges of this court and by the Court of Appeals. In this connection in addition to the opinions that have been filed in this par-

ticular litigation see ***Courtney*** v. ***Bishop***, 409 F. 2d 1185 (8th Cir. 1969); ***Jackson*** v. ***Bishop***, 404 F. 2d 571 (8th Cir. 1968), reversing in part, ***Jackson*** v. ***Bishop***, 268 F. Supp. 804 (E.D. Ark. 1967); and ***Talley*** v. ***Stephens***, supra.

When the ***Holt*** cases were first filed in 1969, the grosser abuses considered in ***Courtney*** v. ***Bishop***, ***Jackson*** v. ***Bishop***, and ***Talley*** v. ***Stephens***, supra, had been eliminated. However, brutality of various kinds was still prevalent when Holt II was decided, and it was still a problem at the time of Holt III.

On December 30, 1971, a date between the decisions in Holt II and Holt III, the court felt constrained to file a supplemental decree enjoining respondents from inflicting any cruel and unusual punishment on any individual inmates and from engaging in any general practices or procedures amounting to the infliction of such punishment and also enjoining respondents from interfering with inmates in their efforts to obtain relief in the courts and from retaliating upon inmates for having sought such relief or for having testified or offered to testify in judicial proceedings.

Contemporaneously with the filing of the opinion in Holt III, the court filed another supplemental decree which, among other things, defined "cruel and unusual punishment" in broad terms so as to include: the infliction upon any inmate of any unreasonable or unnecessary force in any form; the assigning of an inmate to tasks inconsistent with his medical classification; the use of any punishment amounting to torture; the practice of forcing any inmate to run to or from work, or while at work, or in front of any moving vehicle or animal; and the infliction of any punishment not authorized by the Department's rules and

regulations.

Brutality, whether broadly or narrowly defined, is not countenanced in the Department today. Like racial discrimination, brutality in its various forms is strictly forbidden by the prison rules for employees. And it appears that in instances employees who have been guilty of brutality have been discharged or required to resign.

It should always be kept in mind that the reasonable use of force by prison authorities is not only permissible but positively required on occasions. Hence, every incident of violence involving an inmate and a prison employee is not necessarily an incident of brutality.

In other sections of this opinion the court deemed it well to mention the killing of two inmates by other inmates that took place after the record herein had been closed. And the court now feels it necessary to mention another fatal incident that took place in August of last year. This incident unlike the killings that have been described, involved prison personnel to some extent. A young inmate was received at Cummins during the early morning hours on the date of the incident and was put to work with other inmates clearing a ditch bank; he was given no breakfast prior to being put to work, although he did eat lunch. In the afternoon he died in circumstances that were at least suspicious. The incident evoked considerable publicity and stirred up the usual inmate rumors, including charges that the young man had been beaten to death by his guards. An autopsy was performed on the body, and after a rather strange period of delay, the State Medical Examiner reported his finding that the inmate had not been physically assaulted and had come to his death as a result of heat exhaustion. There is at least some

reason to believe that the young man was subjected to "hazing" by fellow inmates and that one or more prison employees may have participated to some extent in the process.

If the foregoing description of the incident is substantially correct, and the court does not know that it is and is making no finding on the subject, the incident was inexcusable, and points up as much as anything else the fact that some employees of the Department are still sadly lacking not only in professionalism but also in ordinary good sense. The court hopes that Commissioner Hutto and Superintendent Lockhart have investigated the incident properly and have taken such disciplinary actions, if any, as might have appeared appropriate.

Getting back to the record, the court does not doubt that incidents of violence still occur in the Department and that some of them may amount to physical brutality. Nor does the court doubt that in spite of Department prohibitions some employees are still using foul language and racial epithets when addressing inmates, and that at times inmates are improperly threatened by their guards and supervisors.

The court has given very careful consideration to the question of whether the inmates are entitled to additional class relief in the matter of brutality. In view of the announced policies of the Department and in view of the relief that has already been granted in this sphere of prison life, the court does not consider that much more relief is called for or that it would do any good. However, the court will in the decree to be entered specifically enjoin all Department personnel from verbally abusing, or cursing, inmates, and from employing racial slurs or epithets when addressing or talking with inmates. That specific prohibition may be of some value to higher echelon employees in their efforts to improve the professionalism and conduct of those who are required to work in close proximity to inmates and who have occasion to deal with inmates.

Disciplinary Procedures

In Holt III the court considered disciplinary procedures that were followed by the Department at that time and that had been devised in 1972 or earlier. The procedures were discussed at some length and were approved subject to the Department's compliance with certain specific directives of the court. 363 F. Supp. at 206-08. On appeal, the Court of Appeals considered the procedures in question in the light of the then very recent decision of the Supreme Court in *Wolff* v. *McDonell*, 418 U.S. 539 (1974). The appellate court approved of the directives of this court but felt that the procedures in question had to be revamped in the light of the *McDonnell* decision, supra. 505 F. 2d at 208.

Wolff v. *McDonnell*, supra, was decided on June 26, 1974. Shortly thereafter the Board of Correction promulgated rules and regulations relating to disciplinary matters which appear in the record as Respondents' Exhibit 688 and most of which appear in the 1975 edition of the Inmate Handbook which has been mentioned. The court finds ultimately that the procedures in question meet the requirements of *McDonnell* and are constitutional.

Each institution has a major disciplinary committee and a minor disciplinary committee. The major disciplinary committee consists of at least four prison officials and must include the Associate Superintendent of the institution or his designee; one member of the security staff of the institution, one member

of the treatment staff, and the Chief Security Officer of the institution who is a member of the committee but has no vote. The minor disciplinary committee, which deals with rule infractions deemed to be of a minor or trivial nature, consists of the Shift Supervisor, who serves as Chairman, and any two other department personnel of the Chairman's choosing. While the major disciplinary committee consists of at least four persons, the committee usually sits in panels of three as was the case in 1973 and 1972. A minor disciplinary committee always consists of three members.

A minor disciplinary committee can impose only minor punishments. It cannot sentence an inmate to confinement in punitive isolation, or deprive him of good time, or change his classification or job assignment. The punishments that it can impose are limited to warnings or reprimands, loss of privileges, and limited extra duty. Once a minor disciplinary committee has acted in a given case, its decision cannot be altered by the major disciplinary committee if the inmate accepts the decision of the minor committee. An inmate is not required to accept the decision of the minor disciplinary committee; if he chooses to do so, he may insist upon being proceeded against before the major disciplinary committee in accordance with the procedures applicable to that committee.

It is not entirely clear from the materials before the court what procedures are followed in connection with a minor disciplinary procedure. The rules do provide that a minor disciplinary committee is to function as "expeditiously as possible," and in view of the limitations on the punishments that such a committee can impose and in view of the nature of the violations considered by such a committee, and the fact that an inmate is not required to accept a minor disciplinary decision adverse to him, the court assumes that the minor disciplinary committee acts in a more summary manner than does the major disciplinary committee. The court has no difficulty with that, and thinks that *Wolff* v. *McDonnell*, supra, recognizes at least by implication that the requirements of procedural due process where only minor rule infractions are involved are less than the requirements that exist where an inmate faces a serious charge that may result in severe punishment.

Turning now to major disciplinary procedures, an inmate facing a major disciplinary charge is required to be served with a written copy of the charge not less than twenty-four hours before the disciplinary hearing that must be held within seventy-two hours after the occurrence of the disciplinary episode, except that in unusual circumstances the Superintendent of the institution may grant limited extensions of time.

The inmate is entitled to appear before the committee, including a panel thereof, and is entitled to present his version of the incident. He may also "call witnesses" in the sense that he may identify potential witnesses to the officer who notifies him of the charge against him. The committee is authorized to call all necessary witnesses. The testimony of a witness may be taken in writing before the hearing or orally before the committee in the course of the hearing.

If in the course of a hearing the panel calls witnesses, the accused is not permitted to be present while the witnesses are testifying; on the other hand, the charging officer is not permitted to be present during the testimony of the witnesses. Commissioner Hutto explained this procedure by saying that in view of the conditions of the prison life an inmate witness is simply not going to say anything adverse to the accused and is

not likely to say anything that may bring him into the bad graces of the charging officer. Consequently, the testimony of inmate witnesses if taken in the presence of either the accused or the charging officer would probably be essentially worthless. The accused is not permitted to cross-examine the employee who prepared the initial disciplinary report and who is frequently the charging officer; in Mr. Hutto's view such cross-examination would be worthless and would be quite likely to cause increased hostility between the inmate and the employee involved and might lead to future confrontations between them. In the court's opinion, Mr. Hutto's views are reasonable, and the court does not consider that the practices just described offend *Wolff* v. *McDonnell* or that they violate due process of law.

At the conclusion of the hearing the panel decides the case, and if the accused is found guilty, punishment is assessed. The Court presumes that the decision and action of the panel in a given case is determined by the vote of a majority of the members of the panel. If the accused is found guilty, the panel is required to state in writing the reasons for its decision.

An inmate may appeal an adverse disciplinary ruling to the Superintendent of the institution by filing a written notice of appeal within three days after the adverse decision is rendered. However, the Superintendent is not required to review the decision unless he considers that the facts of the case warrant review. If the Superintendent's ruling is adverse to the inmate, the latter may appeal to the Commissioner and finally to the Board of Correction itself. However, the rules provide that if in connection with any appeal an inmate willfully and knowingly makes a false statement or deliberately tries to deceive the reviewing authority, the inmate's action is in itself a major disciplinary violation.

While *Wolff* v. *McDonnell* makes it clear that an inmate is not entitled to counsel in the course of a disciplinary proceeding, the Department's rules provide that if an inmate is illiterate or "is otherwise unable to properly present his case, the Chairman may appoint a member of the staff to assist the inmate in his presentation." And the Superintendent is required to provide the Chairman of the committee with a list of staff members who do not regularly sit on the Disciplinary Committee who are available to assist inmates. The court will pause at this point to commend the Board of Correction for adopting that particular rule because a great many inmates, even if not illiterate, are simply too inarticulate to present their contentions systematically or intelligently. The court hopes that the Disciplinary Committee will make liberal use of the rule in question.

The rules further provide that no disciplinary action is to be taken against any inmate save in accordance with the prescribed procedures, except that a shift supervisor may place an inmate in administrative segregation or barracks arrest pending disciplinary committee action.

The court finds that black employees now sit from time to time as members of disciplinary panels. Assuming that the Department is able to and does employ more blacks and that it pursues its announced policy of promoting blacks where possible, increased black participation in disciplinary proceedings is to be anticipated.

In considering the case the Court of Appeals expressed concern lest a charging officer be a member of the panel hearing

the charge, and directed this court to prohibit the charging officer from sitting in judgment on his own complaint. 505 F. 2d at 208. That, of course, will be done.[9]

Punitive Isolation and Administrative Segregation

The rules of the Department specify eight punishments that may be imposed singly or in combination upon an inmate who is found guilty of a disciplinary infraction. Some the punishments are very light and, as has been seen, may be imposed by a minor disciplinary committee. Other punishments are more severe and can be imposed only by a major disciplinary committee.

The serious punishments take a rather wide range, but there is no question that the punishment that is one of the most dreaded by the inmates and that creates a serious constitutional problem is confinement in punitive isolation.

This section of the opinion will be devoted principally to a discussion of punitive isolation as it is practiced in the Department, and most of the discussion will be based on conditions at Cummins where the problem is more severe than it is at Tucker. Also discussed herein will be the "administrative segregation" in small cells of inmates who are awaiting trial on disciplinary

[9]The present rules were issued shortly before the *Finney* decision was handed down. The rules, as written, do not in terms prohibit the practice condemned by the appellate court. It is the court's recollection that when Cecil Boren was Assistant Superintendent at Cummins, he, on one occasion, sat on a disciplinary panel in connection with a matter in which he was the charging officer. Mr. Boren admitted the impropriety of his action, and the court doubts that such a thing would happen again. However, the decree to be entered will specifically prohibit the practice.

charges.[10]

The placing of inmates of a prison in punitive isolation or solitary confinement as punishment for violation of prison rules is not necessarily unconstitutional, but it may be, depending upon the duration of the confinement and the conditions thereof. *Finney* v. *Arkansas Board of Correction*, supra, 505 F. 2d at 207; *Burns* v. *Swenson*, 430 F. 2d 771 (8th Cir. 1970), cert. denied, 404 U.S. 1062 (1972); *Courtney* v. *Bishop*, supra.

In 1973 the court found in Holt III that confinment in punitive isolation in the former "death cells" at Tucker and in the punitive wing of the East Building at Cummins was not unconstitutional, and in that connection specifically found that the cells in use at the two institutions were not overcrowded, and that the diet of "grue," described in Holt I, was not unconstitutional. 363 F. Supp. at 208. The Court of Appeals took a somewhat dimmer view and expressed particular concern as to whether or not inmates held in punitive isolation were adequately supplied with the necessities of life such as proper and sufficient food, heat, light, ventilation and sanitary facilities. *Finney* v. *Arkansas Board of Correction*, supra, 505 F. 2d at 207-08.

From testimony that the court heard in June, 1974, prior to the rendition of the decision of the Court of Appeals in *Finney*, and from additional testimony taken in 1975, and from the court's own inspection of the facilities in question, including both the punitive cells and the administrative segregation cells

[10]While the confinment of an inmate in administrative segregation is somewhat less rigorous in certain respects, including diet, than the confinment of an inmate who has been sentenced to punitive isolation, the two types of confinment are in other respects very similar to each other.

at both Cummins and Tucker, the court now finds that either conditions were not as good in 1973 as the court thought that they were or that the conditions have deteriorated since 1973. Whichever may be the case, the court now finds from the evidence that unconstitutionalities now exist with respect to both punitive isolation and administrative segregation, and that substantial changes are going to have to be made within the immediate future if the Department is to be allowed to continue to place inmates charged with offenses in administrative segregation and to punish inmates by what is called without entire accuracy punitive "isolation."

An inmate sentenced to punitive isolation receives a sentence to confinement in an extremely small cell under rigorous conditions for an indeterminate period of time with his status being reviewed at the end of each fourteen day period. While most inmates sentenced to punitive isolation are released to population within less than fourteen days, many remain in the status in question for weeks or months, depending upon their attitudes as appraised by prison personnel. It is rare indeed that a prisoner is confined in a cell by himself. Usually, he must share a cell with at least one other inmate, and at times three or more inmates are kept in the same cell which is equipped with extremely limited facilities. Assuming, and the court is not at all sure that the assumption is valid, that all of the isolation cells are equipped with two bunks, it follows that if three or four men are put in the same cell, and that frequently happens, one or two of them are going to have to sleep on the floor.

Convicts being what they are, that means that the stronger and more aggressive inmates are going to occupy the bunks, and they are also likely to persecute the weaker inmate or inmates. A

variant of this is that where three convicts are confined in a single cell, two of them are apt to team up against the third one.

Assuming that an inmate in punitive isolation or in administrative segregation has a bunk to sleep on, he also has a cotton mattress to lie upon during sleeping hours, but the mattress is taken away during each day.

During each basic fourteen day period of confinment, an inmate in a punitive cell is fed on a diet of "grue" unless such a diet is medically contradicted. He gets no other solid food, except that every third day he receives or is supposed to receive a regular prison meal.[11] And on every third day the inmate is permitted or required to leave his cell for the purpose of taking a shower and probably changing his clothes. While inmates in punitive isolation may now be allowed some limited outdoor exercise, for a long time the only exercise that the inmates in question could take was that involved in going to the shower room, taking the shower, and returning to the cells.

At the end of a basic fourteen day period of punitive confinement, the inmate is weighed to see how much weight he has lost on the "grue" diet;[12] and if it is determined that he should be returned to punitive isolation, he is given regular food for two

[11]At an early stage of the 1975 hearings the court heard much inmate testimony to the effect that they were "shorted" with respect to their rations on the days on which they were supposed to receive a regular meal. This alleged practice, of which one prison employee in particular was charged, is known as "shaking the spoon."

[12]While the evidence is to the effect that "grue," a tasteless and unappetizing substance, will not only sustain life but is adequate nutritionally for an inmate who is not leading an active life, the evidence also discloses that some inmates simply will not eat the "grue" or will not eat much of it, and that practically all inmates lose weight while in punitive isolation. The court wll note at this point that inmates in administrative segregation are not required to eat "grue." While they are awaiting trial, they receive regular prison food.

days and returned to the "grue" diet on the seventeenth day. It is to be observed that the rules specify that during this two day "interim" or "intermission," the inmate need not be moved from the punitive cell to other quarters, and as a matter of practice they are not moved; they simply stay where they are.

An inmate in punitive isolation is not only held in cramped quarters and fed a limited diet, he also loses practically all privileges and opportunities available to inmates in general population. Such an inmate can receive visits from a clergyman, which vists are probably very rare, and he can engage in such correspondence as the Constitution of the United States guarantees or which the prison administration deems to be otherwise "privileged."

As a class, the convicts confined in punitive isolation or in administrative segregation, for that matter, are violent men. They are filled with frustration and hostility, some of them are extremely dangerous, and others are psychopaths. Confined together under rigorous conditions in the same cell or in immediately adjacent cells, the convicts identify with each other and reinforce each other in confrontation with custodial personnel, and those personnel in turn identify with each other and reinforce each other in confrontation with the convicts.

As a result, the punitive wing in the East Building at Cummins is not infrequently a scene of violence. The inmates vandalize their cells to the extent possible, and that extent has been very substantial; they scream and curse; they abuse the guards and at times attempt to assault and injure them. The trouble is made worse by the poor administrative practice of dispatching, say, two correctional officers to quell a disturbance in a cell containing three or four men or to remove one or two convicts from

such a cell. Such an approach invites and results in trouble.

From testimony in the record the court is convinced that as a class the inmates of the punitive cells hate those in charge of them, and that they may harbor particular hatreds against prison employees who have been in charge of the same inmates for a substantial period of time. In his hatred of guards in general or of a particular guard, an inmate may deliberately run the risk of injury to himself in order to obtain an opportunity to inflict injury upon prison personnel or upon a particular prison employee.

Inmate violence unavoidably produces a forcible response from prison personnel who may be required to use such things as night sticks and the chemical known as "Mace" to quell disorders. And the court is satisfied that at times the response is excessive, and is further satisified that many of the episodes of violence that take place in the maximum security facility could be avoided readily if the guards were more professional and used better judgment and common sense in dealing with refractory inmates. This lack of professionalism and good judgment on the part of maximum security personnel in the Department was one of the things that led the court to say in 1973 that the Department's prisons were not so much unconstitutional as they were poorly administrated. 363 F. Supp. at 202.

The court agrees with Dr. Arthur Rogers, a clinical psychologist who testified as an expert in the 1974 hearings, that punitive isolation as it exists at Cummins today serves no rehabilitative purpose, and that it is counterproductive. It makes bad men worse. It must be changed.

The court thinks that from the standpoint of orderly and ef-

ficient prison administration the Department would be better off if inmates sentenced to punitive isolation were kept alone in individual cells. However, the court is not prepared to go so far as to say that it is unconstitutional to confine as many as two men in the punitive isolation and administrative segregation cells at Cummnns and Tucker provided that each man has a bunk to sleep on at night and to sit upon during the day. The court will enjoin the confining of more than two men at any one time in one of the individual cells in question and will require that where two men are placed in the same cell, each must have a bunk.

This does not mean that in cases of serious emergency as for example a riot or other type of disorder involving large numbers of inmates at the same time, the prescribed cell capacity may not be exceeded for limited periods of time. But the court does not accept the proposition that every disciplinary incident in the Department creates an emergency, or that an emergency continuously exists at either Cummins or Tucker.

As to "grue," it may be arguable as to whether what the Court of Appeals had to say about that substance amounted to a holding that its use as food is unconstitutional. But, even if the language in question does not amount to such holding, which would be binding on this court, it is clear to the court that the constitutional handwriting is on the wall as far as "grue" is concerned, and that its use had as well be outlawed now rather than at some later time or by the appellate courts. And that will be done.

The practice of removing mattresses from the cells during daylight hours, like the diet of "grue", is defended on the ground that if living conditions in the cells are made too com-

fortable inmates will contrive to get themselves consigned to the cells to avoid work. The court does not accept that particular argument either as to "grue" or as to the removal of the mattresses.

However, with respect to the mattresses a more cogent argument is made that the court does accept. The evidence reflects that when a violent inmate in one of the cells is "acting out," as the psychologists call it, he is quite apt to set his mattress on fire, or to tear the mattress up and stuff fragments in the toilet; and it is inferable that his "acting out" is more apt to take place during daylight hours when it is apt to gain more peer approval than if it took place at night when other inmates are trying to sleep or after the violent inmate himself has become fatigued. The court thinks that the respondents' argument is valid, and the practice of removing the mattresses in the daytime, while perhaps questionable, will be permitted to continue.

The court holds that the policy of sentencing inmate to indeterminate periods of confinement in punitive isolation is unreasonable and unconstitutional. The court thinks that determinate sentences of no more than a prescribed number of days must be imposed. In so holding the court does not imply for a moment that there are not some inmates who must be segregated from the general population for any one or more of a number of reasons, and does not condemn that practice. Cf. ***Kelly*** v. ***Brewer,*** supra. But segregated confinement under maximum security conditions is one thing; segregated confinement under the ***punitive*** conditions that have been described is quite another thing.

As to the length of the maximum sentences that may be im-

posed, the court notes that Mr. Hutto is of the view that basically the maximum period of time in which a man should be confined in punitive isolation with a restricted diet, with no mattress in the daytime, and perhaps without a bunk to sleep in at night is fourteen days. In view of the changes in the conditions of confinement in punitive isolation that the court is ordering, the court feels that a maximum sentence of thirty days is permissible. If at the end of that maximum period, it is found that an inmate should not be returned to population, he may be kept segregated but under conditions which are not punitive. Of course, a disciplinary committee may impose a sentence of less than thirty days, and the Superintendent of the institution or the Commissioner may direct that a convict be released from punitive isolation at any time prior to the expiration of his sentence.

Let the court point out in this connection that many acts which constitute serious violations of prison rules also amount to felonies under the laws of the State of Arkansas, and if an inmate commits such an offense he can always be prosecuted in the state courts and may receive a sentence in addition to the one that he was serving when he committed the offense.

The court is well aware of the fact that the changes that are being ordered with respect to punitive isolation and administrative segregation may cause a degree of consternation in the Department and, indeed, outside the Department. But the court sincerely believes that these changes are not only constitutionally required, but also that they will produce both a more humane prison system and a system that is going to be more peaceful and orderly and easier to administer efficiently in the long run.

The East Building at Cummins

In the section of this opinion that dealt with overcrowding the court stated that the population of the East Building at Cummins would have to be reduced. As far as the punitive wing and the administrative segregation wings of the East Building are concerned, the directives of the court in the immediately preceding section hereof ought to take care of the problem of overcrowding. However, there is a third wing of the building that must be dealt with, and there are some other conditions in the East Building that call for attention.

The third wing which may be thought of simply as a "maximum security" wing houses inmates who cannot safety be kept in general population. Some of those inmates require protective custody to prevent them from being killed or injured by other inmates; some are sources of danger to other inmates or to prison personnel; others are high escape risks; and some may be in the wing under consideration for other reasons. While it is not so called in the Department, this wing in some institutions would probably be called the "administrative segregation" wing. Further references to inmates in this section of the opinion will be to persons who are not being held for trial on charges of disciplinary violations and who are not being punished for such violations, but who nevertheless are confined in the wing of the East Building which the court may refer to simply as the "third wing."

Third wing inmates are in certain respects better off than inmates confined in the punitive isolation and administrative segregation wings of the East Building, and are better off than inmates who are held under maximum security conditions in certain other prisons. They receive regular prison food; they

have the same correspondence privileges as do inmates in general population; they have certain commissary privileges; and they are permitted to spend part of their time outside their cells in what is known as the "day room." Moreover, they are not kept in the East Building all day. They work in the prison fields and gardens, and "10 Hoe" and "5 Garden" Squads are made up of inmates of the third wing of the building.

Due to the deficinecy that has been mentioned in the report of November 12, 1975 and the lack of other figures the court does not know how many men were confined in the third wing on November 12 or how many are confined there today. The court is sure, however, that at times more than two men have been confined to a single cell in the third wing, and the court finds that a single cell in the third wing is overcrowded when it has more than two men in it just as the cells in the punitive wing and the administrative segregation wing are overcrowded when occupied by more than two men at the same time. The requirements of the preceding section with respect to cell capacity and bunks will also be made applicable to the third wing of the East Building.

While, as indicated, third wing inmates are better off in certain respects than the inmates of the other wings, there is no question that they are not as well off as inmates in general population and suffer deprivations that general population inmates do not suffer.

Such being the case, the Constitution requires that the status of inmates of the third wing be evaluated and re-evaluated periodically in order to determine whether or not particular inmates can safely be returned to population or whether they should be transferred to other institutions.

The matter of periodic evaluations of the situations of convicts held in maximum security and segregated from the general population was before the Court of Appeals in ***Kelly*** v. ***Brewer***, supra. In that case the court held that such evaluations must take place and that they must be made in the light of relevant, objective criteria, although the court recognized that the proper evaluation of the status of one inmate might require less effort and consideration than the evaluation of the status of another inmate.

In ***Brewer*** the court also held that there are certain criteria that may not properly be employed in the evaluation process. Specifically, the court held that the evaluating authority may not properly consider adverse staff reaction to a return of an inmate to population, or the deterring effect on other inmates that might result from holding a particular inmate or inmates in segregated confinement. And it was further held that the evaluating authority is not to give undue or artificial weight to the offense of which the inmate in question was convicted originally, although, of course, the nature of that offense is a factor for consideration.

The determination of whether an inmate is to be retained in segregation or returned to population is not so much a question of what he has done in the past but of what he is likely to do or have done to him in the future if he is returned to population. In the last analysis the question is one of behavior prediction, and its answer must be left largely to the discretion of the prison administration. Ordinarily, judicial review of an administrative determination that an inmate should remain in segregated status should be limited to an inquiry as to whether the action in question was arbitrary or capricious or was invidiously discriminatory.

The requirement of evaluation and re-evaluation of inmates held under maximum security conditions may seem burdensome to some prison administrators, but it is necessary to protect inmates from being held indefinitely in that status after the original reason for their being placed in it has ceased to be valid or relevant.

The court is going to direct Superintendent Lockhart to review as soon as practicable the status of all convicts now confined in the third wing, and to return to population such inmates, if any, of that wing who can be returned without serious risk to the inmate, to other inmates, to prison personnel, or to the security of the prison.

In the future, the cases of all inmates of the third wing are to be re-evaluated by at least the Assistant Superintendent in charge of security at Cummins not less often than once every sixty days, and the cases of all inmates in the wing are to be reviewed at least once a year by the Superintendent personally.

The evaluation process should involve interviews with the inmates out of the presence of other inmates, and should also involve consideration of psychiatric or psychological opinions to the extent that the same may be available. And the court will say that one of the things that it had in mind in directing the employment of one or more full time psychologists or psychiatrists by the Department is the useful function that such specialists can perform in determining whether or not an inmate should continue to be held in segregated status.

It occurs to the court that friction and confrontations between inmates of the East Building and East Building staff may be due in part to the fact that some of the higher ranking

personnel of the East Building may have been kept on that station too long and have been dealing with the same inmates too long. Commissioner Hutto and Superintendent Lockhart should give serious consideration to rotating the higher ranking employees assigned to the East Building as well as to rotating ordinary correctional officers.

One problem that arises in the East Building is the failure at times to repair promptly damage to the cells and their furnishings resulting from inmate vandalism. In consequence inmates at time have been removed from badly damaged cells and placed in other cells with other inmates thus overcrowding them or aggravating an already overcrowded condition.

The record reflects that those who designed the East Building assured the Department that the building and its facilities were proof against damage by inmates. Such has been far from the case. It is hard for the court to believe, however, that American technology and engineering is not sufficiently advanced in this day and age to equip prison cells with facilities such as lighting and plumbing facilities and locks that inmates cannot destroy or seriously damage with their bare hands or such simple tools or other means as they may be able to devise. If anything practical can be done in that direction, it should be.

Some of the most dangerous and troublesome of the occupants of the East Building are blacks who are or claim to be Black Muslims. Like Muslims in general population, they claim to be the victims of religious as well as racial discrimination. Their principal complaints relate to diet, a subject with respect to which the court has already undertaken to deal, and about restrictions on religious assemblages and access to the inmates by Muslim ministers.

The Muslim inmates of the East Building are entitled to the same, but no greater, privileges in the area of religious worship, including visits by clergymen, as are accorded to inmates of the building who profess other religious faiths. It must be kept in mind that if an inmate is being held legitimately under maximum security conditions of confinement, his exercise of his religion is necessarily somehwat more circumscribed for legitimate security reasons than is such exercise by an inmate who is not a security risk and who is living in the general prison population. For example, the prison administration may legitimately prevent an inmate in general population from visiting an East Building inmate even though the former may be or claim to be a minister and even though the ostensible reason for his calling on the other inmate is to serve the latter's religious needs. Moreover, free world ministers who desire to pay religious calls on inmates of the East Building are subject to reasonable security measures such as reasonable searches for weapons or other contraband. However, the restrictions imposed on visitations by free world clergymen must not be unreasonable or such as are purposely designed to discourage ministers from the outside world from visiting maximum security inmates or other inmates for that matter.

Returning now to the subject of overcrowding of the administrative segregation and punitive isolation cells at Tucker and the overcrowding of the cells in all three wings of the East Building at Cummins, the court observes from the report of November 12, 1975 that as of that date the punitive isolation cells at Tucker with a capacity of 14 men had only three men in them, and that there were 13 men in the administrative segregation cells with a equal capacity of 14 men. Thus by the court's standards, if there were no more than two men in the same cell and if each man had a bunk, the maximum security facilities at

Tucker were not overcrowded on that date. What the situation is today, the court does not know.

It is possible that when this opinion and its accompanying decree are filed, none of the maximum security cells at either institution will be overcrowded. While the court thinks that the existence of such a situation is improbable, if it does exist, well and good. Respondents will simply be required not to let the cells become overcrowded.

Assuming, however, that compliance with the court's decree will require a substantial reduction of the populations of the maximum security cells at either Cummins or Tucker, or both, the court does not think that the respondents should be required to effect the reduction overnight or in a haphazard manner. The court feels that respondents should have a reasonable but comparatively short period of time within which to effect necessary reductions, and now sets that period at thirty days from the filing date of the decree. However, the court's prohibition against limited diets will go into effect immediately.

It will be remembered that in the preceding section of this opinion the court fixed thirty days as the maximum period of time during which an inmate may be confined in punitive isolation. Any inmates who have been confined in punitive isolation for thirty days or longer must be returned to population or held in maximum security under conditions that are not punitive. And inmates who at the time of the filing of the decree herein who have been in punitive isolation for less than thirty days are to be deemed as serving sentences of not more than thirty days.

This section of the opinion is the last of what may be called its "substantive" sections. There are, however, some other

matters to be considered.

Attorney's Fee and Expenses

When this litigation was first commenced, the court appointed Messrs. Steele Hays and Jerry T. Jackson, capable members of the Little Rock Bar, to represent petitioners, and their efforts contributed to the Holt I decision from which there was no appeal. The court did not award Mr. Hays or Mr. Jackson any fee, and the court does not recall that they requested an award.

After Holt I was decided, the attorneys just mentioned were excused from further duty. When the litigation was reactivated, the court appointed Messrs. Jack Holt, Jr. and Philip Kaplan of Little Rock to represent the inmates. Mr. Holt and Mr. Kaplan have been in the case ever since and have rendered yeoman service to their clients. In 1974 when certain inmates of the East Building were permitted to institute a class action of their own, Mr. Phillip E. McMath of Little Rock was appointed to represent them, and he remained actively in the case after the East Building suits were consolidated with the others.

In 1973 in connection with the Holt III decision the court allowed Messrs. Holt and Kaplan an $8,000.00 fee and certain expenses. Those items were paid by the Department of Correction. However, Mr. McMath has never received anything for his services, and Mr. Holt and Mr. Kaplan have received nothing attirbutable to the Holt III appeal or to the present phase of this litigation.

The court's 1973 award that has been mentioned was based in part on the theory that counsel had performed valuable

services not only to the inmates but also to the people of the State of Arkansas as well. In other words, the award was based in part on the "private attorney general" theory. 363 F. Supp. at 217.

After the decision in Holt III, the Supreme Court of the United States decided ***Edelman*** v. ***Jordan,*** 415 U.S. 651 (1974), and ***Alyeska Pipeline Service Co.*** v. ***Wilderness Society,*** 421 U.S. 240 (1975). While the court is of the opinion that Mr. Holt and Mr. Kaplan deserve an additional award of fee and expenses, and that Mr. McMath ought to receive a fee for his services, it is necessary for the court to consider whether in light of either or both of the Supreme Court decisions just mentioned it has the power to make the awards in question. In approaching the problem the court recognizes that as far as the class action phase of the litigation is concerned, the real party respondent is the Department of Correction itself which is an agency of the State of Arkansas. And the court recognizes that any valid award made by it will be paid and should be paid out of state funds in the hands of the Department rather than by the individual respondents personally.

In ***Edelman*** v. ***Jordan,*** supra, the Supreme Court held that while a federal court may grant prospective injunctive relief against state agencies and state officials which may impose financial burdens on the treasury of the state, the eleventh amendment to the Constitution prohibits the federal courts from making retroactive pecuniary awards that will have to be paid out of the funds of the state, unless the state has waived its sovereign immunity.

In ***Alyeska,*** supra, the Supreme Court rejected the "private attorney general" theory as a basis for awards of at-

torneys' fees to prevailing parties in federal court litigation, and held that such fees are allowable only when authorized by statute or when a case falls within one of the long-established exceptions to the "American Rule" which prescribes that each litigant must pay his own lawyer. The exceptions to the rule are that a court of equity may award an attorney's fee where (1) the losing party has been in violation of a court order; (2) the prevailing party has created a fund for the benefit of himself and others, in which case a fee payable out of the fund may be allowed; and (3) the losing party has acted in bad faith, vexatiously, wantonly or oppressively. 421 U.S. at 247-71.

Not long ago this court had ***Alyeska-Edelman*** problems arise in ***Arkansas Community Organization for Reform Now (ACORN)*** v. ***Brinegar,*** 398 F. Supp. 685 (E. D. Ark. 1975), aff'd, ____ F. 2d ____ (No. 75-1681, 8th Cir. Feb. 13, 1976). ***ACORN,*** like ***Alyeska,*** was a "public interest" suit brought by private organizations and individuals for the purpose of protecting the environment. The defendants fell into two classes. One class included the Secretary of the United States Department of Transportation and officials of the Federal Highway Works Administration. The other class was made up of the members of the Arkansas State Highway Commission and officials of the Arkansas State Highway Department. The plaintiffs prevailed in large measure and obtained injunctive relief. However, the court felt that ***Alyeska*** precluded the allowance of any fee to plaintiffs' attorneys. Since the plaintiffs were entitled to recover only one award of costs,, and since that award could be collected from the government as provided by 28 U.S.C. § 2412, the court found it unnecessary to decide at the time whether in view of ***Edelman*** the "state defendants" were liable for costs that would have had to be paid out of Arkansas Highway Department funds.

As to whether ***Edelman*** precludes an award of attorney's fees against state agencies or against state officers sued in their official capacities, the Courts of Appeals appear to be divided, and the question will probably have to be settled ultimately by the Supreme Court. Cases allowing fees notwithstanding ***Edelman*** include ***Thonen*** v. ***Jenkisn,*** 517 F. 2d 3 (4th Cir. 1975); ***Souza*** v. ***Travisono,*** 512 F. 2d 1137 (1st Cir. 1975); ***Class*** v. ***Norton,*** 505 F. 2d 123 (2nd Cir. 1974); ***Boston Chapter NAACP*** v. ***Beecher,*** 504 F. 2d 1017 (1st Cir. 1974; ***Milburn*** v. ***Huecker,*** 500 F. 2d 1279 (5th Cir. 1974). See also the dissenting opinion of Circuit Judge Gewin in ***Newman*** v. ***State of Alabama,*** 522 F. 2d 71, 72 ***et seq.*** (5th Cir. 1975), in which opinion he was joined by Chief Judge Brown and Circuit Judges Wisdom, Thornberry and Goldberg.[13]

Cases in which a fee has been disallowed on the strength of ***Edelman*** include ***Hallmark Clinic*** v. ***North Carolina Dept. of Human Resources,*** 519 F. 2d 1315 (4th Cir. 1975); ***Skehan*** v. ***Board of Trustees of Bloomsburg State College,*** 510 F. 2d 31 (3rd Cir. 1974), ***vacated on other grounds,*** 421 U.S. 983 (1975); and ***Jordan*** v. ***Gilligan,*** 500

[13]***Newman*** v. ***State of Alabama*** involves alleged unconstitutionalities which have existed in the Alabama prison system. The district court granted relief and awarded an attorney's fee and expenses of litigation. ***Newman*** v. ***State of Alabama,*** 349 F. Supp. 278 (M.D. Ala. 1972); a panel of the Court of Appeals affirmed as to the equitable relief granted and reserved for en banc consideration the question of the allowability of the fee and expenses. ***Newman*** v. ***State of Alabama,*** 503 F. 2d 1320 (5th Cir. 1974). The question presented was argued and submitted to the court en banc after ***Edelman*** was decided. In a terse per curiam opinion the majority of the en banc court remanded the case for further consideration in the light of ***Alyeska*** and ***Edelman.*** The dissenters felt that remand for ***Edelman*** consideration was unnecessary and would serve no useful purpose; they felt that the remand should be limited to the question of whether the defendants had acted in bad faith so as to bring the case within the ***Alyeska*** exceptions as far as some of the defendants were concerned. Thus, the majority of the en banc court did not hold that the fee and expenses were not allowable.

F. 2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

The cases holding that Edelman does not preclude the award of an attorney's fee that must be paid out of state funds characterize the allowance of the fee as being purely ancillary to prospective equitable relief properly granted against a state or a state agency. This court now takes that view. The subject is thoroughly and capably discussed in the dissent in *Newman* v. *State of Alabama*, supra.

That the award of an attorney's fee in a civil rights case on the "private attorney general" theory is improper in the absence of a statute allowing such an award was recognized by the Court of Appeals for this circuit in *Gilliam* v. *City of Omaha*, 524 F. 2d 1013, 1017 (8th Cir. 1975). But, in the earlier case of *Doe* v. *Poelker*, 515 F. 2d 541, 546-68 (8th Cir. 1975), the same court held that the case before it fell within one of the *Alyeska* exceptions where the defendant Mayor had obstinately insisted on maintaining an anti-abortion policy in municipally owned hospitals in St. Louis after being on full and ample notice that the policy was unconstitutional or was probably unconstitutional. *See also Doe* v. *Poelker*, 527 F. 2d 605 (8th Cir. 1976).

As indicated, this court does not feel that the allowance of a fee, costs, and expenses is precluded by *Edelman*. With respect to *Alyeska*, the court thinks that the case before it is markedly different in quality from *Alyeska* and also that it falls within the "bad faith" exception to the American Rule recognized in *Alyeska* and in *Doe* v. *Poelkner*, supra.

In the first place, *Alyeska* was a private civil suit brought by environmentalists to prevent the construction of a pipeline in

Alaska. No constitutional issues were involved. The instant case on the other hand involves the grave constitutional question of whether those in charge of the Arkansas Department of Correction and the prisons of the Department are continuing to deprive indigent convicts of fundamental rights and immunities guaranteed to them by the fourteenth amendment.

In the second place, the attorneys in this case who have labored so diligently on behalf of their inmate clients are not in the litigation on their own motion or by their own volition. They did not voluntarily enroll themselves under the banner of convict rights as the attorneys in the *Alyeska* case enlisted under the banner of environmental protection. Counsel in this case are here because they were appointed by the court and for no other reason.

The very variety of the issues discussed and the length of this opinion and of earlier opinions make it obvious that the claims of the convicts could not have been presented to the court intelligently by petitioners themselves; they had to have counsel. And their attorneys have been of assistance to the court as well as to the inmates.

Assuming arguendo, however, that the considerations just mentioned do not serve adequately to distinguish this case from *Alyeska*, the court thinks that in a legal sense respondents and their predecessors in office and employment have acted in bad faith and oppressively, and that the case falls within the "bad faith" exception to the *Alyeska* rule.

If one looks at the history of the Arkansas prison system from 1965 or 1966 down to the present day, one may note a continuous albeit erratic course of improvement. Some of that im-

provement would no doubt have taken place even in the absence of this litigation; and the court will observe that in recent years Arkansas governors and legislators, and members of what is now the Board of Correction, have shown marked sympathy with and affirmative response to prison needs, an attitude that was not always characteristic of former years. On the other hand, it is only fair to say that this litigation has served to impress upon Arkansas policy makers that if the prisons are to be operated at all, they must be operated in a constitutional manner, and has served as a spur to improvement. Moreover, the litigation, including the efforts of petitioners' counsel herein, has served to bring to light certain problem areas that might have been overlooked otherwise.

In earlier stages of the case, when the grossest constitutional violations were brought to light, the prison administration tended to be cooperative in moving against the conditions and practices in question and indeed appeared to welcome the action of the court in requiring them to do what they wanted to do anyway but felt unable to do voluntarily.

It would be unfair to say that the attitude of the respondents is uncooperative today but the court thinks that it has noted that with the passage of time and with improvements in prison conditions being made, there has been some hardening of Departmental attitudes and an unwillingness on the part of the prison administrators to go much if any farther than they have gone, and as has been seen the progress that has been made to this date is still insufficient.

Another observation that may be made is that at practically every stage of the litigation evidence has brought to light practices of which those in higher prison authority were ignorant, and which they eliminated when the facts were disclosed. It seems to the court that the prison authorities should have discovered at least some of those conditions and practices for themselves and corrected them without waiting for them to be developed in the course of evidentiary hearings in this lawsuit.

Since 1968 the Department of Correction has been in what may be called a period of transition from a patently unconstitutional penal system and in the direction of a constitutional system. But, each major transitional step has followed the mandate of this court or of the Court of Appeals. And significantly at each stage of the litigation, remaining constitutional deficiencies have been discovered. In 1973 the court thought that the Department had moved far enough down the transitional road to permit this court to release its supervisory jurisdiction over the Arkansas prisons, but, as all concerned know, the Court of Appeals sharply disagreed.

Enough on this subject has been said. The court is going to allow petitioners' attorneys a fee and certain expenses of litigation.

In fixing the amount of the fee, which counsel may divide among themselves as they see fit, the court will make no effort to adequately compensate counsel for the work that they have done or for the time that they have spent on the case. Adequate compensation would run into many thousands of dollars. On the other hand, the court is not willing to allow merely a nominal fee or one that has no relation to the work that counsel have done. The court is going to allow a substantial fee for the work done by counsel since the remand. Not only are the attorneys entitled to such a fee, but also the allowance thereof may incline the Department to act in such a manner that

further protracted litigation about the prisons will not be necessary.

From its consideration of the matter the court now awards a fee of $20,000.00 to be paid out of the Department of Correction funds.

As to costs, the principal items of costs have been the fees paid to the court reporter for transcripts of depositions and testimony. As the litigation has proceeded, the court has entered certain orders under the terms of which a portion of those fees has been paid by the Department. The court now confirms those orders. This action, however, is without prejudice to the right of the Department at some later date or dates to seek reimbursement or recoupment from certain individual inmates whose individual claims now pending when considered may turn out to be frivolous or patently insubstantial. The court is not saying that there are such claims, but there may be.[16]

Procedural Details

It is now necessary to wrap up procedurally the class action phase of this litigation so that it may be on its way to the Court of Appeals if either side cares to appeal, and the court assumes that one side or the other will so desire. It is also necessary to give some directions to the Clerk as to how this opinion and its accompanying decree should be handled.

Pursuant to this opinion the court will enter its Third

[16]The court will note that the transcript material in question will be available for appellate purposes without additional expense. Attention is called to the fact, however, that the testimony that was taken before the court personally at the outset of the remand hearings has not been transcribed, and the testimony that the court heard in 1974 has not been transcribed.

Supplemental Decree. In order that the decree amount to an appealable order, the court, pursuant to Fed. R. Civ. P. 54(b), now determines that there is no just reason for delaying entry of the decree until disposition of the individual claims and directs that the decree be entered forthwith.

The Clerk is now directed to file the original of this opinion and of the decree in the anchor case before the court, namely, ***Holt, et al.*** v. ***Hutto, Commissioner of Correction, et al.***, No. PB-69-C-24. Copies of the opinion and of the decree will be considered as having been filed in all of the cases consolidated with ***Holt***, and a copy of the opinion and decree will be filed physically in any particular one of the consolidated cases upon the request of either side. Since the court may well have to consider individual inmate claims in all of the individual cases, the Clerk should not close for statistical purposes any of the cases at this time.

Just as the court sees no just reason for delay in entering a decree dealing with the class action aspect of the case, the court likewise sees no reason to delay disposition of the individual claims until an appeal, if there is one, from the class action decree is decided. That is true because decision of an individual claim either in favor of or against a particular inmate is not likely to run counter to the class action decision or to any probable holding of the Court of Appeals with respect to that decision. For example, a claim of Inmate X. that he was denied needed medication on a particular occasion can be decided one way or the other without particular regard to the over-all sufficiency of the health care provided by the Department for inmates in general. The court, therefore, will proceed to adjudicate the individual claims with all convenient speed. The court is probably going to need the help of counsel in connection with the in-

dividual claims, and, as a matter of fact, counsel for respondents have requested leave to brief the issues raised by certain individual claims separately from the general issues raised by the class claims. That leave will be granted; it occurs to the court that counsel for petitioners may likewise want to brief some individual claims separately, and the court will shortly be in touch with counsel on both sides in connection with the individual claims.

While the court would like to relieve counsel for petitioners of their duties in the case at this time and while the court is sure that counsel would like to be relieved, the court does not think it practicable to release them until after the appeal, if any, from the class action decision has been disposed of and until after the court rules on the individual claims.

Since jurisdiction of the case is being retained, the Commissioner will be directed to file not later than July 15, 1976, a report showing what has been done toward complying with the directives and requirements of this opinion and its accompanying decree. The report must include data on the prison population in all institutions administered by the Department as of June 30 or July 1. Those data should be reported in a form conforming generally to the report filed on November 12, 1975, but there must be a breakdown among wings and a cell by cell statement of population in the East Building at Cummins. Further reports may be required in the discretion of the court.

Dated this 19th day of March, 1976.

/s/ J. Smith Henley
J. Smith Henley
United States Circuit Judge
Sitting by Designation

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1660

TERRELL DON HUTTO, et al.,

Petitioners,

v.

ROBERT FINNEY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JACK GREENBERG
STANLEY A. BASS
Suite 2030
10 Columbus Circle
New York, N. Y. 10019

PHILIP E. KAPLAN
622 Pyramid Life Building
Little Rock, Ark. 72201

Attorneys for Respondents

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1660

TERRELL DON HUTTO, et al.,

Petitioners,

v.

ROBERT FINNEY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Questions Presented

1. Does the Civil Rights Attorney's Fees Awards Act of 1976 apply to cases pending on appeal on the date of its enactment, and does the Act authorize an award of attorneys' fees against a state department of correction?
2. Does the Eleventh Amendment bar an award of attorneys' fees authorized against a state department of correction by the Civil Rights Attorney's Fees Awards Act of 1976?
3. Was the district court order prohibiting indefinite use of punitive isolation an appropriate means of providing a continuing prophylaxsis against cruel and unusual punishment, found to exist throughout the entire Arkansas prison system?

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I. The Decision Of The Court Below Does Not Conflict With Decisions Of This Court Or Other Courts Of Appeals

A. Award of Attorney's Fees

Petitioners' contention that the award of attorney's fees herein is barred by the Eleventh Amendment, and is not authorized by Congress, is refuted by both the Civil Rights Attorney's Fees Awards Act of 1976, and by this Court's decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

The Act, as the court below correctly observed, permits an order, as was entered in this case, requiring the award to be paid directly from the funds of a state agency, such as the Department of Correction, whether or not the agency is a named party.

The Legislative History of the Act explicitly states:

> ... it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).1/

Moreover, the Legislative History further states that "fee awards are ... provided ... in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5." Ibid. Accordingly, under this Court's decision in Fitzpatrick v. Bitzer, supra, no Eleventh Amendment bar exists.

1/ Civil Rights Attorney's Fees Award Act of 1976, Source Book: Legislative History, Texts, And Other Documents, p. 5 (1976).

Finally, the Legislative History of the Act makes it clear that Congress intended that the rule of Bradley v. Richmond School Board, 416 U.S. 696 (1974), apply, and that the Act govern all civil rights cases pending at the time of its enactment.2/

Other courts of appeals have also applied the 1976 Act to civil rights cases pending on appeal at the time of its enactment. See, Martinez-Rodriguez v. Jiminez, 551 F.2d 877 (1st Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977).

B. Indefinite Punitive Isolation

As the court below noted, "This appeal is the latest chapter in the seemingly endless litigation involving the constitutionality of the Arkansas state prisons." 548 F.2d, at 741.

District Judge Henley's order, limiting the use of indefinite punitive isolation was not made on a bare record, or in a vacuum, but rather, in accordance with the court of appeals' mandate, after several years of litigation, "to eliminate the unlawful conditions which now exist in the Arkansas prison system." Finney v. Arkansas Board of Corrections, 505 F.2d 194, 214 (8th Cir. 1974).3/

The court of appeals referred to "[t]he continued infliction of physical abuse, as well as mental distress, degradation,

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2/ Source Book, supra, at 202 (Senate Debate); 212, n. 6 (House Report).

3/ The court of appeals had observed: "[We] confront a record and factual history of a sub-human environment, in which individuals have been confined under the color of state law." Id., at 215.

and humiliation by correctional authorities." Id. at 206.

> Such unlawful conduct by correctional personnel is of major significance leading to this Court's finding that the present correctional system in Arkansas is still unconstitutional ... [T]he District Court shall retain jurisdiction and take, if it deems advisable, additional evidence on those conditions of confinement ... and disciplinary measures which must be changed in order to provide a continuing prophylaxsis against such cruel and inhumane treatment." Id.

The court of appeals explicitly directed the district court to amend its decree "to ensure that prisoners placed in punitive solitary confinement are not deprived of basic necessities including light, heat, ventilation, sanitation, clothing and a proper diet." Id., at 207-08.

On remand, the district court held additional hearings, and entered several orders relating to Arkansas prison disciplinary measures.[4/] The only portion appealed from concerned the prohibition against committing prisoners to punitive segregation for indefinite periods of time.

In light of the entire background of this matter, the evidence, and the court of appeals' mandate "to provide a continuing prophylaxsis against such cruel and inhumane treatment," supra, the district court's ruling on this point was correctly affirmed.

At the outset, the distinction should be noted between segregated confinement under maximum security conditions, and

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4/ For example, the feeding of "grue "was finally restrained. Also, the trial court enjoined confinement of more than two men at a time in one punishment cell, and required that each person have a bunk. 410 F. Supp. at 277.

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segregated confinement under the punitive conditions actually existing in the Arkansas correctional system. The district court's order in question merely placed a maximum of 30 days confinement in punitive confinement.

> If at the end of that maximum period, it is found that an inmate should not be returned to population, he may be kept segregated but under conditions which are not punitive. 410 F. Supp. at 278.

It is clear, therefore, that prison officials still retain authority to segregate chronic troublemakers from the rest of the prison population. Such prisoners can initially be placed in punitive confinement for up to 30 days, and then, if they persist in misbehaving, they can be kept segregated, but under less punitive conditions. However, gratuitous cruelty, i.e., forcing inmates to endure indefinitely while cramped into an "extremely small cell," which is "equipped with extremely limited facilities," usually with at least one other inmate, and at times three or more inmates kept in the same cell, has, as a matter of basic humanity, been limited. 410 F. Supp. at 275.

The trial court realistically noted the vicious cycle of violence perpetuated by the Arkansas style of indefinite punitive segregation, both as to guards and inmates, whose end product serves no rehabilitation purpose, and is counterproductive. Making bad men worse cannot possibly serve any legitimate state interest. 410 F. Supp. at 276-77.

> [T]he Court sincerely believes that these changes are not only constitutionally required, but also that they will produce both a more humane prison system and a system that is going to be more peaceful and orderly and easier to administer efficiently in the long run. 410 F. Supp. at 278.

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Petitioners' attempt to rely upon the Second and Fifth Circuits' rulings, in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); and Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), is misplaced since neither New York's nor Texas' entire correctional system had previously been declared unconstitutional, in contrast to the unfortunate situation in Arkansas. The order entered in this case cannot properly be evaluated in isolation, but rather, must be viewed in context, i.e., as one of many facets of relief "to provide a continuing prophylaxsis against such cruel and inhumane treatment," 305 F.2d at 206.

The trial judge, who heard the facts, and acting pursuant to the court of appeals' mandate, entered an appropriate order designed to bring the Arkansas correctional system back on the road toward a constitutional level. Under all of the circumstances, his judgment was correct, and was properly sustained.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

September, 1977

JACK GREENBERG
STANLEY A. BASS
Suite 2030
10 Columbus Circle
New York, N. Y. 10019

PHILIP E. KAPLAN
622 Pyramid Life Building
Little Rock, Ark. 72201

Attorneys for Respondents

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1660

Terrell Don Hutto, Sub Nom, James Mabry, Commissioner, Arkansas Department of Correction: Marshall N. Rush, Chairman, Arkansas Board of Correction: Eula Dorsey, Vice-Chairman, Arkansas Board of Correction: Thomas H. Wortham, M.D., Secretary, Arkansas Board of Correction: Richard E. Griffin, Member, Arkansas Board of Correction: And John Elrod, Member, Arkansas Board of Correction .... *Petitioners*

vs.

Robert Finney, et al ..... *Respondents*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

BILL CLINTON
Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201
and ROBERT ALSTON NEWCOMB
Assistant to the Director
P. O. Box 8707
Pine Bluff, Arkansas 71611
Attorneys for Petitioners

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IN THE

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vs.

Robert Finney, et al .....*Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported as *Finney* v. *Hutto*, 548 F. 2d 740 (1977), appears in the Appendix to the Petition for Certiorari. The opinion of the United States District Court for the Eastern District of Arkansas is reported, *Finney* v. *Hutto*, 410 F. Supp. 251 (1976) and appears in the Appendix to the Petition for Certiorari.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on January 6, 1977. A timely petition for rehearing en banc was denied on February 3, 1977. A timely petition for extension of time was filed in this Court and Mr. Justice Blackman entered an Order Extending Time to File Petition for Writ of Certiorari to May 25, 1977. This Court granted Certiorari on October 17, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(c)(1).

QUESTIONS PRESENTED

I

Whether Public Law 94-559, The Civil Rights Attorney's Awards Act of 1976, authorized the awarding of attorney fees to be paid by a State, which was not a party to the suit?

II

Whether the Eleventh Amendment to the Constitution absolutely bars the award of attorney fees to be paid by a State?

III

Whether the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the use of indefinite punitive isolation for serious infractions of prison discipline?

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

STATUTORY PROVISIONS INVOLVED

Public Law 94-559, approved on October 19, 1976, states:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as 'The Civil Rights Attorney's Fees Awards Act of 1976.'
>
> Sec. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: 'In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion,

may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.' "

STATEMENT OF THE CASE

The petitioners are the Commissioner of Corrections and the Board of Correction for the State of Arkansas. In the district court they were the respondents and in the Court of Appeals, they were the appellants. The case involves the constitutionality of the Arkansas Department of Correction. This particular part of the case arose from the hearings held by the United States District Court after the decision of the Eighth Circuit Court of Appeals in *Finney* v. *Arkansas Board of Correction*, 505 F. 2d 196 (1974).

The Honorable J. Smith Henley, Circuit Judge, sitting by designation in *Finney* v. *Hutto*, 410 F. Supp. 251 (1976), ordered certain changes in the operation of the Arkansas Department of Correction but found many aspects of the operation of the Department of Correction constitutional. The petitioners did not challenge those parts of the district court order setting population ceilings for the institutions, prohibiting the serving of "grue", requiring the hiring of a full-time psychiatrist or psychologist, and requiring a study of the health care system of the Arkansas Department of Correction by the Arkansas Department of Health.

The petitioners sought review in the Court of Appeals of only three parts of the district court order: (1) the award of attorney fees, (2) the award of cost for travel and use of investigators, and (3) the prohibition against the use of indefinite punitive isolation.

In this Court the petitioners seek review of only two aspects of the case. The petitioners contend that the district court exceeded its jurisdiction in a suit brought pursuant to 42 U.S.C. § 1983, where it ordered the State of Arkansas to pay $20,000 to counsel for the respondents as attorney fees. The petitioners also contend that the Court of Appeals erred in awarding counsel for respondents $2,500.00 as attorney fees for services on appeal. The final contention of the petitioners is that the use of indefinite punitive segregation as punishment for serious violations of prison discipline does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

The petitioners contend that Congress, by failing to amend 42 U.S.C. § 1983, when it passed Public Law 94-559 authorized suits against States pursuant to the statute did not create the authority for a United States District Court to award attorney fees against a State. It is further contended that under *Bradley* v. *The School Board of the City of Richmond*, 416 U.S. 696 (1974), that if Public Law 94-559 authorized the award of attorney fees it should not be applied retroactively because it abrogates the Eleventh Amendment rights of the State of Arkansas.

The second point of petitioners' argument is that the Eleventh Amendment to the Constitution of the United States bars the award of attorney fees to be paid by a State even when the award is based on the "bad faith" exception to the American rule prohibiting the awarding of attorney fees to the prevailing party.

The final part of petitioners' argument concerns the scope

of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States. The petitioners contend that the District Court erred when it prohibited the use of indefinite punitive segregation because it served "no rehabilitative purpose." (p. 71, Appendix to Petition for Certiorari) The petitioners contend that *Gregg* v. *Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859 (1976), established that rehabilitation was not a necessary goal before a particular form of punishment did not offend the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States.

ARGUMENT

I

PUBLIC LAW 94-559, THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, WAS IMPROPERLY APPLIED IN THIS CASE

Public Law No. 94-559 (Oct. 9, 1976) provides:

> "In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, Title IX of Public Law 92-318, or in any civil action proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost."

The petitioners respectfully submit that the language of Public Law 94-559 does not authorize a United States District Court or a United States Circuit Court of Appeals to make the State of Arkansas or any State pay attorney fees. The basis of petitioners' argument is that in passing the Civil Rights Attorney's Fees Awards Act of 1976, Congress failed to specifically amend 42 U.S.C. § 1983 to include a State as a party which could be sued pursuant to it.

The petitioners recognize that this Court in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614 (1976) held that in a suit brought pursuant to 42 U.S.C. § 2000 et. seq. there was statutory authorization for the award of attorney's fees against a

State. It is respectfully contended that *Fitzpatrick*, supra, is not controlling in the instant case since Public Law No. 94-559 does not expressly contain "threshold . . . Congressional authorization" to allow a state to be named as a defendant in a suit brought pursuant to 42 U.S.C. § 1983. *Fitzpatrick*, supra, 49 L. Ed. 2d at 619.

42 U.S.C. § 2000 e (a) which was involved in *Fitzpatrick*, supra, is unlike the Civil Rights Attorney's Fees Award Act, Public Law 94-559, in that it expressly provided that those subject to suit include "governments, governmental agencies (and) political subdivisions." Public Law No. 94-559 did not amend 42 U.S.C. § 1983 to include a State as a person subject to the provisions of 42 U.S.C. § 1983.

> "The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe* v. *Pape*, 365 U.S. 167, 187-191, 5 L. Ed. 2d 492 (1961) to exclude cities and other municipal corporations from its ambit; that being the case, it cannot have been intended to include states as parties defendant." *Fitzpatrick*, supra, 427 U.S. at 452, 49 L. Ed. 2d at 619.

The Court of Appeals for the Eighth Circuit in affirming the award of attorney fees against the State of Arkansas in this case relied on certain statements contained in the legislative history of Public Law 94-559 as authority to compel the State of Arkansas to pay attorney fees in a case to which it was not a party. The petitioners contend that express statutory language allowing a State to be named as a party in 42 U.S.C. § 1983 actions is required before an award of attorney fees can be made against a state pursuant to Public Law 94-559.

Judge Muir in *Skehan* v. *Board of Trustees of Bloomsburg State*

College, 436 F. Supp. 657, 667 (M.D. Penn., July 20, 1977) stated: "In the absence of explicit statutory language subjecting the states to liability for damages and attorney's fees, this Court will not imply a limit to the state's immunity to suit under the Eleventh Amendment." This Court has stated: "It would . . . be surprising . . . to infer that Congress deprives [a State] of her constitutional immunity without changing the [statute] under which she could not be sued or indicating in some way by *clear language* that the constitutional immunity was swept away." *Employees of the Department of Public Health and Welfare* v. *Missouri*, 411 U.S. 279, 285 (1973) [emphasis added].

PUBLIC LAW 94-559 SHOULD NOT BE APPLIED RETROACTIVELY

Citing *Bradley* v. *The School Board of the City of Richmond*, 416 U.S. 696 (1974), and legislative history, the Court of Appeals found that Public Law No. 94-559 applied to this case even though the District Court had made the award of attorney's fees prior to the enactment of the statute.

The petitioners submit that *Bradley*, supra, is distinguishable from the instant case. In *Bradley*, supra, this Court dealt with 20 U.S.C. § 1617, which granted authority to a federal court to award a reasonable attorney's fee against a local educational agency, a state (or any agency thereof) or the United States (or any agency thereof) for violations of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment, as they pertained to elementary and secondary education. Because the defendant in *Bradley*, supra, was a local school board, there was no discussion of a State's Eleventh Amendment protection or the propriety of retroactively applying legislation which would have a direct fiscal impact on a State's

treasury. Consequently, the reliance on *Bradley*, supra, ignores the fact that the State of Arkansas, unlike a local school board, is protected by the Eleventh Amendment.

The petitioners concede that as a general principle newly enacted legislation governs litigation pending at the time of its enactment unless clear legislative history to the contrary is present. But in *Bradley*, supra, 416 U.S. at 711, this Court noted "... that a Court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice. ... " It is respectfully contended that to apply Public Law 94-559 retroactively would be manifestly unjust.

> "The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice centered upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Bradley*, supra, 416 U.S. at 717.

The petitioners submit that the impact of Public Law 94-559, if it is applicable in this case, drastically changes the rights of the State of Arkansas and that the right changed by the statute is a constitutional right enjoyed by the State of Arkansas ever since it became a State. The petitioners can conceive of no greater right than one conferred by the Constitution of the United States and to change that right is very significant.

The impact of Public Law 94-559, if it is applicable to the State, is tremendous in that it directly affects the budgetary and fiscal policy of the State of Arkansas as expressed through the enactments of the Arkansas General Assembly. To hold that Public Law 94-559 is retroactively applicable to the State of

Arkansas would be to create the potential for chaos in the operation of State government. Amendment 13 to the Constitution of the State of Arkansas prohibits deficit spending by the State. Therefore, the payment of attorney's fees by the State of Arkansas requires that money appropriated for other purposes has to be diverted from the purpose intended by the legislature to satisfy the judgment entered by a United States District Court. The forced reallocation of already appropriated funds is fundamentally unfair to the State of Arkansas and has a serious impact on the right of the Arkansas Legislature to determine how the fiscal affairs of the State are going to be conducted.

Conceding that pursuant to *Fitzpatrick*, supra, the Eleventh Amendment can be modified by proper Constitutional action, there is no rational basis for allocating to Congress the plenary and non-reviewable power to thwart the Eleventh Amendment retroactively. This is especially true in the instant case, in which (1) there is no specific mention that Public Law 94-559 applies to a State, (2) a State cannot be joined as a defendant under *Monroe* v. *Pape*, supra, and (3) the fiscal consequences to the State of Arkansas are significant. While the protection afforded the States since 1789 by the Eleventh Amendment may now, in some situations, be altered by Congress, due process demands that the States at least be given notice that significant sums in the future will have to be set aside for attorney's fee awards.

Therefore, the petitioners pray that this Court will vacate the award of attorney fees made by the District Court and the Court of Appeals.

II

THE ELEVENTH AMENDMENT PROHIBITS THE AWARD OF ATTORNEY FEES TO BE PAID BY A STATE

The petitioners respectfully submit that requiring the State of Arkansas to pay attorney fees is the same as an award of damages against the State based upon asserted prior misconduct by state employees. The petitioners contend that the Eleventh Amendment bars the award of attorney fees even if the State of Arkansas had acted in bad faith in this litigation.

The Court of Appeals in affirming the district court's award of $20,000.00 in attorney fees to be paid by the State of Arkansas relied on P. L. 94-559 and the finding of bad faith on the part of the petitioners by the district court. The Court of Appeals stated:

> "Although, in view of the statute, we are not required to pass on the issue of bad faith, the record fully supports the finding of the district court that the conduct of the state officials justified the award under the bad faith exception enumerated in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)." *Finney* v. *Hutto*, 548 F. 2d at 742, ftn. 6.

The United States District Court for the Eastern District of Arkansas awarded attorneys' fees to counsel for the petitioners in the sum of $20,000.00. The Court also awarded costs totaling a maximum amount of $2,000.00. The District Court directed that "these awards are to be paid out of Department of Correction funds." (p. 90 Appendix to Petition for Certiorari).

The Department of Correction is an agency of the State of Arkansas created by the first extraordinary session of 1968 of the Arkansas Legislature. (Ark. Stat. Ann. § 46-100 et seq., Supp. 1975). The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

While the Amendment does not bar suits against the state by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in federal courts by its own citizens as well as by citizens of another state. See *Edelman* v. *Jordan*, 415 U.S. 651, 662-663 (1974), and cases cited therein. The petitioners contend that the State of Arkansas was not a party to this action, but the order of the District Court awarding attorneys' fees clearly requires that the payment be made from the treasury of the State of Arkansas. (*Finney*, supra, F. Supp. at 285).

> "It is also well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Company* v. *Department of Treasury*, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945), the Court said, '(W)hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants.' Id. 464, 89 L. Ed. 389. Thus, the rule has evolved that a suit by private

parties seeking to impose a liability which must be paid from public funds and the State treasury is barred by the Eleventh Amendment." *Edelman*, supra, U.S. at 663.

Petitioners submit that the State of Arkansas has not waived its sovereign immunity by operating a prison system, which rightfully can be subject to suits for injunctive relief under 42 U.S.C. § 1983. This court in *Edelman*, supra, dealt with the issue of waiver of sovereign immunity and found that:

> "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.' " *Edelman*, supra, 673, L. Ed. 2d at 678 (citations omitted).

Therefore, it is clear that the award of attorneys' fees cannot be predicated on a waiver of the Eleventh Amendment defense by the State of Arkansas solely because it has chosen to operate a prison system. The State of Arkansas clearly has not consented to being sued, and under its Constitution cannot waive the defense of sovereign immunity. The Arkansas Constitution provides, "The State of Arkansas shall never be made defendant in any of her courts." Ark. Const. Art. 5 § 20 (Ark. Stat. Ann. Vol. 1). See also *Pitcock* v. *State*, 91 Ark. 527, 121 S.W. 2d 742 (1909).

The Circuit Court of Appeals which have dealt with the award of attorneys' fees subsequent to the decision in *Edelman*,

supra, have reached conflicting results. In *Jordan* v. *Gilligan*, 500 F. 2d 701, 705 (6th Cir. 1974), cert. den., 421 U.S. 991, the Court stated:

> "Does a Federal Court have the power to award attorneys' fees against a state or its officials acting in their official capacity in a suit brought under 42 U.S.C. § 1983 to vindicate constitutional rights? To this inquiry we must respond in the negative."

Accord, *Taylor* v. *Perini*, 503 F.2d 989, 901 (6th Cir. 1975), vacated on other grounds at 421 U.S. 982; *Named Individual Members, San Antonio Conservation Society* v. *Texas Highway Department*, 492 F. 2d 1017 (5th Cir. 1974), cert. den. 420 U.S. 926; *Hallmark Clinic* v. *North Carolina Department of Human Resources*, 519 F. 2d 1315, 1317 (4th Cir. 1974). Contra; *Jordan* v. *Fusari*, 496 F. 2d 646 (2nd Cir. 1974).

The district court in the instant case based its decision on the principles that attorneys' fees can be awarded against the State as ancillary to prospective equitable relief and if the case was litigated in "bad faith". (*Finney*, supra, 410 F. Supp. at 284 and 285).

Petitioners believe that neither of these theories abrogate the Eleventh Amendment's prohibition against awarding money judgments against an unconsenting state. The petitioners realize that this Court in *Ex Parte Young*, 209 U.S. 123 (1908), recognized that injunctive relief can be granted even though it will have a prospective effect on the state treasury. Petitioners' position is that the Circuit Courts of Appeal which have followed the "ancillary effect" doctrine have misinterpreted *Edelman*, supra. The term "ancillary effect" as used in

Edelman, supra, came at the conclusion of a paragraph discussing *Ex Parte Young*, supra. The phrase was clearly delineated in the following paragraph and cannot be used to support the award of attorneys' fees. This Court stated:

> "But the portion of the District Court's decree which petition challenges on Eleventh Amendment grounds goes much further than any other cases cited. It required payment of State funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when the petitioner was under no court-imposed obligation to conform to different standards. While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many respects from an award of money damages against the State . . . . It is measured in terms of a monetary loss resulting from past breach of a legal duty on the part of the defendant state officials.
>
> "Were we to uphold this portion of the District Court's decree, we would be obligated to overrule the Court's holding in *Ford Motor Company* v. *Department of Treasury*, supra. There a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana State officials who were charged with their collection. . . . The term 'equitable restitution' would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax extraction. Yet this Court

> had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case." *Edelman*, supra, U.S. at 668-669.

Therefore, *Edelman*, supra, clearly establishes that the Eleventh Amendment is a complete bar to the awarding of attorneys' fees against the State since such an award represents a direct levy on the State treasury and has a direct impact on the fiscal affairs of the State of Arkansas.

Petitioners realize that the other ground used by the District Court and the Court of Appeals to award attorneys' fees, "bad faith," is a recognized exception to the normal American rule prohibiting the awarding of attorneys' fees to the prevailing party. *Alyeska Pipe Line Company* v. *Wilderness Society*, 421 U.S. 240 (1975).

The "bad faith" exception should not be applicable in a case involving the award of attorneys' fees against a state. Although certain courts have taken the position that *Sims* v. *Amos*, 340 F. Supp. 691, 694 (N.D. Ala. 1972), aff'd, 409 U.S. 942, stands for the proposition that attorneys' fees may be awarded when there is "bad faith" notwithstanding the Eleventh Amendment, that reliance on *Sims*, supra, is not well founded. It should be noted that in *Murgea* v. *Massachusetts Board of Retirement*, 386 F. Supp. 179, 182 (D. Mass. 1972), aff'd 421 U.S. 972, a three-judge panel denied attorneys' fees ". . . both as a matter of law, and as a matter of discretion." This case, just as *Sims*, supra, was summarily affirmed by this Court. It should be further noted that except for *Sims*, supra, all the other cases cited by this Court in *Alyeska Pipeline Company*, supra, concerning

"bad faith" involved parties other than states.

Therefore, petitioners respectfully contend that *Sims*, supra, cannot be considered controlling authority. In discussing the effect of affirmances of three-judge panel decisions this Court in *Edelman*, supra, U.S. at 670-671 stated:

> "This Court, while affirming the judgment, did not in its opinion refer to or substantively treat the Eleventh Amendment argument. Nor, of course, did the summary dispositions of the three district court cases contain any substantive discussions of this or any other issue raised by the parties. . . . Equally obvious (summary affirmances) are not of the same precedential value as would be an opinion of this Court treating the question on the merits."

The petitioners pray that this Court will reverse the award of attorney fees by the Court of Appeals and the District Court, since

> "(t)he history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting state." *Employees of Department of Public Health & Welfare*, supra, 411 U.S. at 284.

III

THE EIGHTH AMENDMENT DOES NOT PROHIBIT THE USE OF INDEFINITE PUNITIVE SEGREGATION

The District Court in enjoining the use of indefinite punitive isolation stated: ". . . punitive isolation as it exists at

Cummins today serves no rehabilitative purpose, and that it is counter-productive. It makes bad men worse. It must be changed." *Finney* v. *Hutto*, 410 F. Supp. at 277 and (p. 71 of Appendix to Petition for Certiorari). The Court of Appeals for the Eighth Circuit affirmed the District Court on the ground that indefinite punitive isolation constitutes cruel and unusual punishment. *Finney* v. *Hutto*, 548 F. 2d at 741, 742 and (p. 4 of Appendix to Petition for Certiorari).

The petitioners submit that the District Court and the Court of Appeals erred in holding that indefinite punitive isolation was cruel and unusual punishment because they failed to apply the proper test of what constitutes cruel and unusual punishment and failed to give proper consideration to the opinions of the prison officials.

The test of what constitutes cruel and unusual punishment consists of:

> "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." *Gregg* v. *Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859, 875 (1976).

This test does not preclude a particular form of punishment because it serves no rehabilitative purpose. The idea advanced by the District Court and affirmed by the Court of Appeals that indefinite punitive isolation is impermissible because it makes "bad men worse" and serves no rehabilitative purpose is not a proper test to determine if a prison practice violates the constitution. The Court of Appeals for the First Circuit has recently stated: ". . . we are not persuaded that courts'

occasional references to the penological purposes served by various punishments establishes a constitutionality based test for reviewing prison practices." *Nadeau* v. *Helgemoe*, 561 F. 2d 411, 416 (Aug. 24, 1977). The Fifth Circuit Court of Appeals has noted:

> "The mental, physical, and emotional status of individuals, whether in or out of custody, do deteriorate and there is no power on earth to prevent it. . . . If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration." *Newton* v. *Alabama*, 559 F. 2d 283, 291 (Sept. 16, 1977).

The practice of indefinite sentences to punitive isolation for violation of prison disciplinary rules has been upheld by two Circuit Courts of Appeal. In *Sostre* v. *McGinnis*, 442 F. 2d 178, 193 (2nd Cir., En Banc, 1971), it was stated:

> ". . . The Eighth Amendment (does not forbid) indefinite confinement under the conditions endured by Sostre for all the reasons asserted by Warden Faollette until such time as the prisoner agrees to abide by prison rules — however, counter-production as a correctional measure, or however personally abhorrent the practice may seem to some of us."

The position of the Court of Appeals in *Sostre*, supra, was

reaffirmed in *Mukmuk* v. *Commissioner of the Department of Correctional Services*, 529 F. 2d 272, 277 (2nd Cir., 1976), where the Court said:

> "We have held it permissible to keep a prisoner in segregation until he agrees to abide by the rules of the institution."

The Court of Appeals for the Fifth Circuit in *Novak* v. *Beto*, 453 F. 2d 661 (1971), Rehearing and Rehearing En Banc denied, 456 F. 2d 1030 (1972) noted:

> "There is also, of course, a vigorous debate over the comparative roles of punishment and rehabilitation in the correctional stage of our criminal justice system. It is not our place, however, to resolve that debate. We think it is enough simply to say that, as of now, deterrents and punishment still have an active place in our prisons. It is beyond dispute, of course, that order must be maintained in the prisons. When a prisoner continues to break prison rules even after losing such privileges as going to the movie and being assigned extra work, the authorities must have some harsh measure to induce compliance with prison regulations."
>
> "Our role as judges is not to determine which of these treatments is more rehabilitative than another, or which is more effective than another. The constitution does not answer such questions. The scope of our review is very limited under the cruel and unusual punishment clause." 453 F. 2d at 670.

The petitioners pray that since the District Court failed to

find that indefinite punitive isolation, "involve[d] the unnecessary and wanton infliction of pain" or was "grossly out of proportion" to the offense that this Court will dissolve the injunction prohibiting indefinite punitive isolation. *Gregg* v. *Georgia*, id.

The petitioners further submit that the District Court erred in not giving proper consideration to the views of the prison officials concerning the need for the use of indefinite punitive isolation. Mr. Hutto, Commissioner of Correction, testified: "The purpose of the punitive wing is quite simple. It is to provide the administration with the necessary measure of control to maintain the safety and the order and well-being of all the inmates and staff who have to work in that institution and have to live in that institution." (*Graves & Terry* v. *Lockhart*, PB-74-C-81, 107, 118, Vol. 1 of 1, p. 147, incorporated into *Finney, et al* v. *Hutto, et al*, by the District Court, March, 1976.)

Mr. Hutto also stated: "As a general rule, most inmates do not stay in punitive isolation for a period even up to 15 days. But there are some who are very recalcitrant and hostile, who refuse, for example, to accept any work assignment, and there is little choice that we simply can't say to them at the end of 15 days, 'Well, even though you still maintain stoutly that you are not going to work, and you're not going to participate in the programs, we can forgive all now and you can do what you want to.' "It just becomes a question of who is going to run the institution, the inmates or the staff." (Tr. Vol. 23, p. 47)

In describing punitive segregation and the mechanism used for sentencing a person there by the Arkansas Department of Correction the District Court stated:

> "It seems clear, . . . that if the prison administration commits folks who refuse to work or who are insubordinate about work at times in much the same way that a Court can commit a man for contempt, civil contempt; that is, on the theory that he holds the key, the prisoner holds the key, and when he wants to work he can come out any day." (*Graves & Terry* v. *Lockhart*, supra, p. 100, 101.)

There was no evidence introduced in the District Court to show a systematic abuse of punitive isolation. Mr. A. L. Lockhart, Superintendent of the Cummins Unit, testified that for the year preceding June 14, 1974, the average stay in punitive isolation had been fourteen days. Respondents' Exhibit Number 691 clearly shows that very few inmates spend more than fifteen days in punitive isolation. (Tr. Vol. 23, p. 84). The appellants respectfully submit that the use of an indefinite sentence to punitive isolation is not cruel and unusual punishment where there is a review and the decision for or against release is based upon valid panel considerations. If an inmate who has been assigned to punitive isolation will not behave during that period of time or still refuses to perform his job assignment, the prison administration should not have to release him. If they did there would be no method of compelling inmates to perform work assignments.

The imposition of the punishment of punitive segregation is not generally the first choice of punishment, except in cases involving major violation of the institutional rules.

> "Punitive isolation is ordinarily used as a punishment when reprimands, minor disciplinaries, loss of privileges, suspended sentences, and similar measures have been tried without satisfactory results. It is a major disciplinary

measure and will be used when other forms of action prove inadequate, where the safety of others is concerned, or when the serious nature of the offense makes it necessary." (Pgs. 29-30 of Respondents' Exhibit No. 693 introduced in Vol. 23, p. 85 of *Finney* v. *Hutto*.)

As noted by Chief Justice Burger:

"Prisons, by definition, are closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society. Of necessity, rules far different than those imposed on society at large must prevail within prison walls. The federal courts, as we have often noted, are not equipped by experience or otherwise to 'second guess' the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances." *Jones* v. *North Carolina Prisoners' Union*, ____ U.S. ____, 53 L. Ed. 2d 629, 646 (concurring opinion) (June 23, 1977)

The petitioners pray that since the District Court and the Court of Appeals failed to give any consideration to the views of the prison administrators concerning the need for indefinite punitive isolation, that this Court dissolve the injunction prohibiting the use of indefinite punitive isolation as a form of punishment for major violations of prison regulations.

CONCLUSION

For the above stated reasons the petitioners pray that this Court will reverse the judgment of the United States Court of Appeals insofar as it awarded $2,500.00 as attorney fees and upheld the District Court's award of $20,000.00 in attorney fees and injunction prohibiting indefinite punitive isolation.

Respectfully submitted,

BILL CLINTON
Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201
and ROBERT ALSTON NEWCOMB
Assistant to the Director
P. O. Box 8707
Pine Bluff, Arkansas 71611
Attorneys for Petitioners

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1660

TERRELL DON HUTTO, *et al.*,

Petitioners,

v.

ROBERT FINNEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

PHILIP E. KAPLAN
1650 Tower Building
Little Rock, Arkansas 72201

JACK HOLT, JR.
1100 North University
Evergreen Place
Little Rock, Arkansas

PHILIP E. McMATH
McMath, Leatherman & Woods, P.A.
711 West Third Street
Little Rock, Arkansas 72201

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
STANLEY BASS
ERIC SCHNAPPER
LYNN WALKER
10 Columbus Circle
New York, New York 10019

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BRIEF FOR RESPONDENTS

CITATIONS TO OPINIONS BELOW

The opinions of the courts below are as follows:

1. Memorandum Opinion of June 20, 1969; *Holt v. Sarver,* 300 F. Supp. 825 (E.D. Ark. 1969) hereinafter referred to as *HOLT I.* (Appendix p. 22)*

*Appendix citations (hereinafter A.) are to the Appendix of Opinions, Decrees, Orders, and Pleadings prepared by the Respondents and filed with the Court.

2. Memorandum Opinion of February 18, 1970; *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) (A. 34) affirmed and remanded 442 F.2d 304 (8th Cir. 1971) (A. 67) hereinafter referred to as *HOLT II*.

3. Memorandum Opinion of August 13, 1973; *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973) (A. 84), reversed *sub nom. Finney v. Arkansas Board of Correction*, 505 F.2d 194 (8th Cir. 1974) (A. 112) hereinafter referred as *HOLT III*.

4. Memorandum Opinion of March 19, 1976, *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976) (A. 141); Clarifying Memorandum Opinion of April 2, 1976, unreported (A. 188); affirmed 548 F.2d 740 (8th Cir. 1977) (A. 195).

5. The Memorandum Opinion of September 29, 1977 in *Graves v. Lockhart*, E.D. Ark. Civil Nos. PB-74-C-81 and PB-74-C-107, is unreported (A. 198).

QUESTIONS PRESENTED

1. Did the District Court exceed its authority in forbidding the use of indefinite punitive segregation as part of its remedy for the unconstitutional conditions in the punitive facilities?

2. Does the Eleventh Amendment preclude the award of counsel fees from state funds where the unsuccessful state defendants in a federal action have acted in bad faith, vexatiously, wantonly, or for oppressive reason?

3. Does the Civil Rights Attorney's Fees Awards Act of 1976 authorize awards of counsel fees against state agencies in actions under 42 U.S.C. §1983?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes and constitutional provisions cited in the brief for petitioners, the case also involves Act 543 of the Arkansas Acts of 1977 approved March 18, 1977. Act 543 provides as follows:

ACT 543

"AN ACT Authorizing the State of Arkansas to Pay Actual Damages Adjudged Under Certain Circumstances Against Officers or Employees of Arkansas State Government, or Against the Estate of Such an Officer or Employee; Defining the Extent of Applicability of the Act: and for Other Purposes.

Be it Enacted by the General Assembly of the State of Arkansas:

SECTION 1. The State of Arkansas shall pay actual, but not punitive, damages adjudged by a state or federal court, or entered by such a court as a result of a compromise settlement approved and recommended by the Attorney General, against officers or employees of the State of Arkansas, or against the estate of such an officer or employee, based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties.

SECTION 2. Upon the recommendation of the Attorney General, the State of Arkansas shall have authority to pay damages based on an act or omission by an officer or employee of the State of Arkansas while acting without malice and in good faith within the course and scope of his employment and in the performance of his official

duties, where the amount of damages is determined by negotiated settlement before or after an action had been commenced.

SECTION 3. Damages payable under this Act shall be reduced to the extent that the officer or employee has been indemnified or is entitled to indemnification under any contract or insurance.

SECTION 4. A party desiring to make a claim for indemnification under this Act shall notify the Attorney General of the filing of a complaint in any court or the making of any other form of demand for damages promptly after it is filed or made and permit the Attorney General to participate in all trial or settlement negotiations or proceedings regarding the complaint or demand. Compliance with all requirements of this Section shall be prerequisite to payment of any claim under this Act. Nothing in this Section shall be construed to deny any party desiring to make a claim under this Act from employing legal counsel of his choosing to defend any lawsuit or other demand for damages.

SECTION 5. The Arkansas State Claims Commission shall have jurisdiction over all claims for indemnification based on a judgment or negotiated settlement in conformity with Sections 1 and 2, and proceedings for the recovery of such claims, and the payment of such claims, shall be governed by the law governing proceedings before the State Claims Commission and payment of claims allowed by the Commission.

SECTION 6. Elected state officials and members of commissions, boards, or other governing bodies of agencies are officers of the State of Arkansas for the purpose of this Act.

SECTION 7. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 8. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

SECTION 9. EMERGENCY. It is hereby found and determined by the General Assembly that a number of State officers and employees are being made defendants in lawsuits seeking damages for their acts or omissions in the performance of their official duties; that in many instances such lawsuits are filed against the estates of such officers or employees; and that it is essential that the State of Arkansas offer protection for its officers or employees against personal liability for performing their official duties, and that the immediate passage of this Act is necessary to accomplish this purpose. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approved."

APPROVED: March 18, 1977.

STATEMENT

A. Introduction

This is a consolidated group of cases in which prisoners confined in the Arkansas State Prison system have complained that conditions in the prisons violate their rights under the Fourteenth Amendment. The case has been pending since 1969 and the decisions of the

District Court – Circuit Court Judge J. Smith Henley (formerly district judge) sitting by special designation – have been reviewed by the Court of Appeals for the Eighth Circuit on three occasions.[1] The present petition seeks review of two rulings contained in the District Court's Third Supplemental Decree dated March 19, 1976 which were affirmed on appeal. The first ruling complained of was the District Court's decision limiting the amount of time prisoners may be confined in punitive isolation cells at Cummins and Tucker Prisons to a period of thirty days for a single offense. This 30-day limitation was one of a number of rulings ordering changes of rules and conditions in the punitive cells which were designed to comply with a prior mandate of the Eighth Circuit, which had in 1974 directed the District Court to formulate a remedy to "ensure that prisoners placed in punitive solitary confinement are not deprived of basic necessities including light, heat, ventilation, sanitation, clothing and a proper diet." *Finney v. Arkansas Board of Correction*, 505 F.2d 194, 207-208 (8th Cir. 1974).

The second ruling complained of by the petitioners is the District Court's award of a counsel fee of $20,000.00 to be shared by three court-appointed attorneys (Messrs. Kaplan, Holt and McMath) for services performed during the period from 1974 to 1976. The court ordered that this fee be paid from the budget of the Arkansas Corrections Department.

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[1] The reported opinions occupy 129 pages in the official reports. The Eighth Circuit has called the case "seemingly endless." 548 F.2d at 741.

In order that the present issues may be seen in their complete context, we shall review proceedings from the inception of the case in 1969, before giving a more detailed statement of the proceeding which led to the Third Supplemental Decree. Throughout this statement of the case the facts regarding conditions and circumstances in the Arkansas prison system as found by the District Court are set out in some detail with references to appropriate parts of the record. It should be noted that the findings of fact by the District Court throughout this litigation have not been challenged in this Court by the petitioners and therefore are not at issue here. Thus, the legal questions presented by the decision sought to be reviewed must be judged in light of essentially undisputed facts.

B. *Holt I* and Previous Prison Suits

Litigation about prison conditions in Arkansas began in 1965 and has continued since that time, resulting in repeated holdings of constitutional violations. In *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965), and in *Jackson v. Bishop*, 268 F. Supp. 804 (E.D. Ark. 1967), reversed in part 404 F.2d 571 (8th Cir. 1968), the courts outlawed the whipping of inmates with a strap and various tortures such as the "Tucker Telephone" and the "teeter board." The court found that Arkansas prisoners were being subjected to torture and "brutal

and sadistic atrocities."[2] In 1969 in *Courtney v. Bishop*, 409 F.2d 1185 (8th Cir. 1969), the Court held in an individual case that solitary confinement did not violate a prisoner's constitutional rights.

In each of these earlier cases plaintiffs were inmates who filed *pro se* complaints and the cases were presented by court-appointed attorneys who served without compensation.[3]

[2] In *Jackson v. Bishop*, 268 F. Supp. 804, 815 (E.D. Ark. 1967), the Court wrote:

> "There can be no doubt that the brutal and sadistic atrocities which were uncovered by the investigation of the State police in August and September of 1966 cannot be tolerated. The Court has reference to the use of a telephone shocking apparatus, the teeter board, strapping on the bare buttocks and other torturous acts of this nature."

Some criminal prosecutions of prison employees were brought but few convictions were obtained. 309 F. Supp. at 368-369, note 4.

[3] The appointment of counsel was noted in each of the opinions. In *Talley v. Stephens*, 247 F. Supp. 683, 685 (E.D. Ark. 1965), the Court stated:

> "Petitioners have been represented most capably by Bruce T. Bullion of Little Rock and Louis L. Ramsay, Jr. of Pine Bluff, appointed by the Court to represent petitioners without charge. The Court is grateful to Messrs. Bullion and Ramsay for their services."

In *Jackson v. Bishop*, 268 F. Supp. 804, 806 (E.D. Ark. 1967) the Court said:

> "The court appointed Edward L. Wright of Little Rock and William S. Arnold of Crossett, both highly respected and experienced members of the Arkansas bar, to represent the plaintiffs without charge. They have done so most capably and the Court thanks them for their services."

(continued)

The *Holt I* proceedings which are described in the Memorandum Opinion of June 20, 1969, *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969), resulted from the consolidation of three *pro se* prisoner complaints. The prisoners complained that confinement in isolation cells at Cummins Farm amounted to cruel and unusual punishment, that they were denied adequate medical care, and that the authorities fail to protect inmates from assaults by other inmates. 300 F. Supp. at 826. The court-appointed counsel for plaintiffs conducted an evidentiary hearing.[4] The Court rejected plaintiff's

(footnote continued from preceding page)

On Appeal in *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), the Court noted at p. 573:

> "We initially commend Edward L. Wright of Little Rock and William S. Arnold of Crossett, court-appointed counsel for the plaintiffs and Don Langston who argued the cases for the defendant for their candid, unemotional and fair and able presentations. The services rendered by Mr. Wright and Mr. Arnold, and the expenses they have incurred, were without anticipation of reimbursement."

In *Courtney v. Bishop*, 409 F.2d 1185, 1186 (8th Cir. 1969), the Court stated:

> "Phillip K. Lion and Robert L. Robinson, Jr. lawyers of Little Rock, Arkansas, were appointed to represent petitioner."

[4] The Court stated at 300 F. Supp. 827:

> "The court-appointed Mr. Steele Hays of Little Rock, an experienced and capable trial attorney, to represent petitioners without charge. Mr. Hays accepted the appointment. He and one of his associates, Mr. Jerry Jackson, without expectation of compensation or reimbursement, proceeded to the farm where they interviewed petitioners and others and took photographs of the facilities. Both Mr. Hays and Mr. Jackson vigorously represented petitioners at a rather extended hearing which consumed two full trial days and part of one night. The Court is most grateful to Messrs. Hays and Jackson for their services."

complaint about the food served to prisoners while in isolation. The Court also found that the evidence about assaults on prisoners by prison employees and trusty guards was not sufficient to justify relief. However, the Court did find that the State "has failed and is failing to discharge its constitutional duty with respect to the safety of certain convicts,[5] and that the conditions existing in the isolation cells, including overcrowding, render confinement in those cells under those conditions unconstitutional." 300 F. Supp. at 828. At the time of the 1969 decision, the isolation unit at Cummins was a one story concrete block building with twelve cells which were 10 feet long and approximately 8 feet wide. The Court found that the isolation cells were dirty and unsanitary, pervaded by bad odors, that the mattresses were uncovered and dirty and that the cells were chronically overcrowded. The average number of men confined in a single cell was four. 300 F. Supp. at 832.

Inmates in the isolation unit were served a food mixture known as "grue", which consists of meat, potatoes, vegetables, eggs, oleo, syrup and seasoning baked all together in a pan and served in four-inch squares. The Court found that grue was not appetizing and not served attractively but nevertheless found it a "wholesome and sufficient diet for men in close

[5] The Court particularly noted the problem of "Crawlers" and "Creepers", inmates who have had feuds with other inmates and who assaulted them while they were asleep. The Court noted that inmate "floorwalkers" were ineffective in preventing such assaults since they were either afraid to call guards or were in league with the assailants. 300 F. Supp. at 830-831.

confinement day after day." 300 F. Supp. at 832. In concluding that the confinement in isolation as then practiced at Cummins violated the Cruel and Unusual Punishment Clause, the Court noted that "if confinement of that type is to serve any useful purpose, it must be rigorous, uncomfortable and unpleasant." *Id.* at 833. However, the Court found that the "prolonged confinement of numbers of men in the same cell" under these conditions to be "emotionally traumatic as well as physically uncomfortable." *Id.* at 833. The Court said about the confinement in isolation: "It is hazardous to health. It is degrading and debasing; it offends modern sensibilities, and, in the Court's estimation, amounts to cruel and unusual punishment." *Id.* at 833.

The relief granted however was quite limited. The Court, rather than mandating specific changes, merely made "suggestions" to the defendants. 300 F. Supp. at 833-834. The Court suggested that efforts be made to hold the number of persons confined in a single isolation cell at one time to a "minimum". *Id.* at 834. The Court suggested that inmates not be long confined in isolation in advance of a hearing, and stated that the defendant "ought to be able at minimum expense to do something about the sanitary conditions of the cells and he might give consideration to doing so without much regard to the attitudes of the inmates." *Ibid.* The Court directed the defendants to report the changes made and retained jurisdiction.

C. *Holt II* – Litigation During 1970 and 1971

The *Holt II* proceedings are described in the Memorandum Opinion of February 18, 1970; *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), affirmed and remanded 442 F.2d 304 (8th Cir. 1971). In December 1969 Judge Henley consolidated five additional *pro se* prisoner complaints with the three cases which were considered in the *Holt I* opinion. He also appointed new counsel, Messrs. Kaplan and Holt, who have served since December 1969 as counsel for members of a class of prisoners in the Arkansas system.[6] The appointed counsel filed a Consolidated Amended and Substituted Complaint which prayed for declaratory and injunctive relief. A. 208. The Complaint alleged that the defendants violated the prisoners' rights under the Thirteenth and Fourteenth Amendments.[7]

[6]The Court stated at 309 F. Supp. at 364:

> "It appearing to the Court that constitutional questions raised by the petitions submitted by the complaining inmates per sese were substantial, the Court appointed Messrs. Jack Holt, Jr. and Philip Kaplan of the Little Rock Bar to represent Petitioners without charge. Messrs. Holt and Kaplan accepted the appointments and have done yeomen service on behalf of their clients. The Court wishes to thank them for their efforts."

[7]The claim is summarized in ¶20 of the Consolidated Amended and Substituted Complaint:

> "The actions of defendants have deprived members of the plaintiff class of rights, privileges and immunities secured to them by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, including: (a) the right not to be imprisoned without meaningful rehabilitative opportunities, (b) the right to be free from cruel and unusual punishment, (c) the

(continued)

The Court sustained the claim that the overall conditions and practices of the Arkansas State Penitentiary system amounted to a violation of the Cruel and Unusual Punishment Clause. 309 F. Supp. at 365. The Court also sustained the claim that unconstitutional racial discrimination and segregation was being practiced in the system. *Id.* at 366. The Court rejected a claim that forced labor in the prisons violated the Thirteenth Amendment. *Id.* at 365.

At the time of the 1970 decision the Arkansas prison system was operated primarily with trusty prisoners serving as guards and with very few free world employees. 309 F. Supp. at 373. The three principal units in the system were the Cummins Farm, the smaller Tucker Intermediate Reformatory and the small Women's Reformatory located on the Cummins Farm. *Id.* at 366. At the largest institution at Cummins only 35 free world employees were in "ostensible charge of slightly less than a thousand men." *Id.* at 373. "Of these 35 only 8 were available for guard duty, and only 2 of them were on duty at night." *Ibid.* The trusty guard system, the confinement of inmates in large open

(footnote continued from preceding page)

> right to be free from arbitrary and capricious denial of rehabilitation opportunities, (d) the right to minimal due process safeguards in decisions determining fundamental liberties, (e) the right to be fed, housed and clothed so as not to be subjected to loss of health or life, (f) the right to unhampered access to counsel and the courts, (g) the right to be free from the abuses of fellow prisoners in all aspects of daily life, (h) the right to be free from racial segregation, (i) the right to be free from forced labor, (j) the right to be free from the brutality of being guarded by fellow inmates."

(309 F. Supp. at 364).

barracks, bad conditions in the isolation cells, an absence of a meaningful program of rehabilitation and other aspects of prison life were held in combination to create an unconstitutional system. The Court said:

> "For the ordinary convict a sentence to the Arkansas Penitentiary today amounts to a banishment from civilized society to a dark and evil world completely alien to the free world, a world that is administered by criminals under unwritten rules and customs completely foreign to free world culture.
>
> After long and careful consideration the Court has come to the conclusion that the Fourteenth Amendment prohibits confinement under the conditions that have been described at the Arkansas Penitentiary System as it exists today, particularly at Cummins, is unconstitutional.
>
> Such confinement is inherently dangerous. A convict however cooperative and inoffensive he may be, has no assurance whatever that he will not be killed, seriously injured or sexually abused. Under the present system the State cannot protect him.
>
> Apart from physical danger, confinement in the Penitentiary involves living under degrading and disgusting conditions . . .
>
> * * *
>
> It is one thing for the State to send a man to the Penitentiary as a punishment for crime. It is another thing for the State to delegate the governance of him to other convicts, and to do nothing meaningful for his safety, well being, and possible rehabilitation. It is one thing for the State not to pay a convict for his labor; it is something else to subject him to a situation in which he has to sell his blood to obtain money to pay for his

> own safety, or for adequate food, or for access to needed medical attention." (309 F. Supp. at 381).

With respect to the isolation cells at Cummins the 1970 opinion found that while the overcrowding noted in *Holt I* "seems to have been ameliorated; the other conditions still exist." 309 F. Supp. at 378. The Court noted the planned construction of a new maximum security unit at Cummins, and stated that the operation of the unit by trustys was a source of constant trouble. *Ibid.* However the Court concluded that since overcrowding had been relieved and many of the conditions were due to the conduct of the inmates, the isolation cells were not as serious a constitutional problem as other aspects of the penitentiary. The Court ordered an end to the system of trusty guards in the isolation cells and in addition ordered that food service be made more sanitary and palatable. 309 F. Supp. at 384-385.

On appeal by the defendants the Court of Appeals affirmed. *Holt v. Sarver,* 442 F.2d 304 (8th Cir. 1971). The Court of Appeals rejected the defendant's argument that the case was a suit against the State barred by the Eleventh Amendment, the Court relying on *Ex parte Young,* 209 U.S. 123 (1908). The Court held that jurisdiction was properly invoked to enforce the Eighth Amendment under 42 U.S.C.A. §1983 and 28 U.S.C.A. §1343(3). The Court rejected the argument that the record did not support the District Court's findings of an Eighth Amendment violation. On remand the District Court held further hearings in November and December 1971 and entered a supplemental decree dated December 30, 1971. A. 78. The Court noted that there had been great progress in making the system a constitutional one; that there were still problem areas

and that the court should retain jurisdiction. A. 78. The Court supplemented the earlier injunctions by provisions which enjoined any cruel and unusual punishments, enjoined interferences with inmates' access to the courts and to counsel, and enjoined reprisals against inmates for exercising their right to access to the court. *Ibid.*

D. *Holt III* – Litigation in 1973 and 1974

The *Holt III* proceedings are described in the opinion of August 13, 1973, *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973), affirmed in part, reversed in part, *sub nom. Finney v. Arkansas Board of Corrections*, 505 F.2d 194 (8th Cir. 1974). On September 8, 1972 the Court filed a memorandum and order noting that it was receiving a constant stream of complaints which gave the court concern that inmates were beaten and abused and otherwise mistreated in violation of the Court's prior orders. A. 81. Ultimately the Court consolidated 34 individual and class actions with the pending *Holt* proceeding and held evidentiary hearings in November and December 1972 and January 1973.

In the opinion issued August 13, 1973, Judge Henley found that the prison system had undergone substantial changes. The trusty system had been essentially dismantled, and a new maximum security building (the East Building) had been built at Cummins. The Court held that a number of conditions at Cummins and Tucker were undesirable but no longer unconstitutional and that the main difficulties resulted from poor administration. 363 F. Supp. at 201-202. The Court did

order further injunctive relief to deal with various problems of racial discrimination including prohibiting undue restrictions against Black Muslims, prohibiting the continued racial segregation of inmates in the maximum security unit at Cummins and issuing a general injunction to attempt to deal with problems of race discrimination in job assignments of blacks and in punishment of inmates within the institution. 363 F. Supp. 203-205.

With respect to the maximum security unit, the Court found that the cells were not overcrowded, that they were properly lighted and ventilated and that their conditions did not constitute a violation of the Eighth Amendment. 363 F. Supp. at 208. The Court also refused to enjoin the continued diet of grue in the punitive isolation cells. *Ibid.* The Court concluded that it was not necessary for it to continue to retain further supervisory jurisdiction. 363 F. Supp. at 216.

The Court granted a request from Messrs. Holt and Kaplan that they be awarded a counsel fee. The Court granted a fee of $8,000 plus $502.80 to reimburse them for money paid to law students and directed that the members of the Board of Corrections make those payments out of available department funds. 363 F. Supp. at 217. These orders were embodied in a Second Supplemental Decree issued August 13, 1973. A. 109.

The plaintiffs appealed from the Second Supplemental Decree and on appeal the Eighth Circuit found continuing constitutional violations and ordered the District Court to continue to retain jurisdiction:

> "This Court recognizes the difficult issues the District Court has passed upon since the commencement of this litigation in 1969. We are

nevertheless compelled to find on the basis of the overall record that there exists a continuing failure by the correctional authorities to provide a constitutional and, in some respects, even a humane environment within their institutions. As will be discussed, we find major constitutional deficiencies particularly at Cummins, in housing, lack of medical care, infliction of physical and mental brutality and torture upon individual prisoners, racial discrimination, abuses of solitary confinement, continuing use of trusty guards, abuse of mail regulations, arbitrary work classifications, arbitrary disciplinary procedures, inadequate distribution of food and clothing, and total lack of rehabilitative programs. We are therefore convinced that present prison conditions, now almost five years after *Holt I*, require the retention of Federal jurisdiction in the granting of further relief." (505 F.2d at 200).

With respect to the punitive wing the Court noted that prisoners were denied the regular prison diet and served grue as a form of further punishment. The Court of Appeals noted that while the District Court thought that grue constituted a nutritionally sufficient diet, it found that conclusion "dubious." 505 F.2d at 207. The Court directed the District Court to ensure that prisoners in the punitive wing are "not deprived of basic necessities including light, heat, ventilation, sanitation, clothing, and a proper diet." 505 F.2d at 208.

E. *Graves v. Lockhart* – 1973-1974 Proceedings

Proceedings in the *Graves* Case are described briefly in an unreported opinion filed on September 29, 1977. A. 198. *Graves* was initiated in late 1973 and consisted of two consolidated complaints filed by Willie Graves and other prisoners who complained of race discrimination and other types of mistreatment in the punitive wing at the Cummins Prison. *Graves* was filed during plaintiffs appeal from the *Holt III* determination that there was no constitutional violation in the punitive wing. In early 1974 the district court appointed Philip McMath, Esq. to represent the prisoners in *Graves*, and conducted a trial of about six days. (Only one day's testimony from this hearing has been transcribed to date). The district court stated in the subsequent memorandum opinion of September 29, 1977 that, as the case progressed "it became clear that the issues raised by petitioners in these cases were in large measure the same issues that had been raised and considered in *Holt III* which was then pending on appeal, and that no useful purpose would be served by undertaking to decide these cases until the court of appeals should decide that case." A. 200. After the Court of Appeals's decision in *Finney* was announced in October, 1974 the district court consolidated *Graves* with the *Holt-Finney* litigation. The evidence in *Graves* was thus considered as a part of the record in the subsequent *Finney* proceedings described below. Mr. Philip McMath, the appointed attorney in *Graves* was awarded an attorney's fee in the subsequent *Finney* decision which is now being reviewed in this Court. The injunctive relief granted in *Finney-Holt* was considered

applicable to the *Graves* case. The individual damage claims of the plaintiffs in *Graves* were subsequently dismissed in the memorandum opinion of September 29, 1977. A. 204.

F. *Finney v. Hutto*, – Proceedings 1975-1977

The proceedings in the district court after the 1974 Eighth Circuit remand are described in the Memorandum Opinion of March 19, 1976 reported as *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976). See also the Clarifying Memorandum Opinion filed April 2, 1976, which is unreported. A. 188. These decisions were affirmed by the Eighth Circuit January 6, 1977, *sub nom. Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977).

The March 19, 1976 opinion reviews the evidence taken in extensive hearings before the District Court and before a United States Magistrate during 1975.[8] Judge Henley stated that the court "recognizes that it should not embroil itself unreasonably in the affairs of the department" and that "much must be left to the discretion of the prison administrators." 410 F. Supp. 254. However, the opinion stated that constitutional deprivations continued to exist and that the court must grant appropriate relief. The opinion, which covers

[8]The hearing before the Magistrate was treated as depositions. 410 F. Supp. at 253 note 2. The hearings in open court in 1975 have not been transcribed by the court reporter. 410 F. Supp. at 285, note 14. The same is true of most of the 1974 *Graves* transcripts.

some 35 pages in the official reports, contains separate sections discussing the following subjects: "Overcrowding", "Medical Services and Health Care", "Rehabilitation", "Regulations as to Mail and Visitors", "Legal Assistance to Inmates", "Inmate Safety", "Race Relations in General", "Racial Discrimination", "Grievance Procedure", "The Black Muslims", "Brutality", "Disciplinary Procedures", "Punitive Isolation and Administrative Segregation", "The East Building at Cummins", "Attorney's Fees and Expenses", and "Procedural Details". The court issued its Third Supplemental Decree on March 19, 1976. A. 177. See also the Clarifying Memorandum Opinion of April 6, 1976. A. 188.

With respect to overcrowding the Court found that conditions in 1975 were worse than in either 1973 or 1974, although after the 1975 hearings conditions were alleviated substantially. The court granted extensive additional injunctive relief as to a variety of prison conditions.[9] 410 F. Supp. at 254-257. With particular

[9]With respect to health care, the Court ordered a new study to be made by the Arkansas State Board of Health of medical facilities at Cummins and Tucker, ordered the employment of one or two full time psychiatrists or clinical psychologists at the prison hospital, and issued an order prohibiting the disciplinary committee from punishing inmates for malingering or pretending illness to avoid work unless the disciplinary committee had consulted with a doctor who examined the inmate prior to making such a finding. 410 F. Supp. at 258.

The Court approved the changes made by the Corrections Department in establishing a rehabilitation program, approved the newly adopted regulations as to mail and visitors and the procedure for furnishing legal assistance to inmates by a full time legal adviser employed by the Department. *Id.* at 262. The Court found inmates were no longer used as armed guards in the State

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reference to the punitive isolation cells the Court found that the East Building at Cummins was overcrowded, that cells designed to house only one prisoner had been used to house three or four men and that the East Building "has been chronically overcrowded and that something must be done about the situation" 410 F. Supp. at 257.[10] The Third Supplemental Decree set

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prison system and that inmate safety had been substantially improved. *Id.* at 263. With respect to race relations, the Court ordered a program to recruit more black employees and put blacks in positions of meaningful authority in the prison system. *Id.* at 265-268. In addition to the previous orders prohibiting discrimination against Black Muslims the Court enjoined the defendants from serving Muslims any food which contained pork; this applied in maximum security cells as well as in general population. *Id.* at 269-270. With respect to brutality against inmates, the Court supplemented its prior decrees prohibiting tortures and other brutal treatment by an additional injunction prohibiting employees of the Department "from verbally abusing, or cursing, inmates, and from employing racial slurs on epithets when addressing or talking with inmates." *Id.* at 272. With respect to disciplinary procedures adopted by the defendants to comply with *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court added a prohibition against a charging officer sitting in judgment on his own complaint. *Id.* at 272-274.

[10]A report prepared by the defendants in response to the Third Supplemental Decree issued by the court contains a description of the Cummins facility including the East Building. The report states, "There are 22 rooms in the punitive wing, designed to house one inmate per room, but convertible to two-man rooms in an emergency." See, Commissioners' Report to the Court as directed in the Third Supplemental Decree Attachment, #8, p. 46 (July 14, 1976). In answers to interrogatories the defendants acknowledged that each had one bunk, one toilet, and one sink. See Answers to Interrogatories Propounded to Defendants (May 3, 1974) at page 6, A. p. 226. The defendants also admitted that up to three inmates were confined in these one-man cells. See Defendants' Response to Request for Admissions of Fact (May 3, 1974) page 3, A. 219.

maximum capacity limits for Cummins and Tucker prisons, and approved the capacities of individual housing units at Cummins and Tucker as set forth in a report from the defendants. For the maximum security cells at Tucker and all cells in the East Building at Cummins the court entered an injunction restraining defendants from confining more than two persons in any maximum security cell at the same time, and requiring that each person be provided with a bunk and mattress on which to sleep at night, subject to exceptions for "cases of serious emergencies involving large numbers of violent or unruly inmates." A. 179. The Clarifying Memorandum Opinion permitted full use of certain four-man cells, however, the Court provided that inmates in "punitive isolation" should not be confined with more than two men in a cell. A. 189.

Pursuant to the mandate of the Eighth Circuit, the Court conducted an extensive further inquiry into conditions in punitive isolation in the East Building at Cummins. 410 F. Supp. at 274-281. The Court also examined conditions at Tucker Prison and in the other two wings of the Cummins East Building where prisoners are held in segregation pending trial in one wing and in maximum security in the third wing. After considering testimony heard in *Graves* in 1974 and the consolidated cases in 1975 and conducting the Court's own inspection of the punitive cells and the administrative segregation cells of both Cummins and Tucker, Judge Henley reversed his prior ruling and concluded that the conditions were unconstitutional. Judge Henley decided that either conditions were not as good in 1973 as he had thought at that time or the conditions had deteriorated since that period. 410 F. Supp. at 275.

"Whichever may be the case, the Court now find from the evidence that unconstitutionalities now exist with respect to both punitive isolation and administrative segregation, . . ." *Ibid.* The Court found that an inmate sentenced to punitive isolation was confined "in an extremely small cell under rigorous conditions for an indeterminative period of time with his status being reviewed at the end of each fourteen day period." *Ibid.* The Court found that while most inmates sentenced to punitive isolation were released in less than fourteen days "many remained in the status in question for weeks or months, depending upon their attitudes as appraised by prison personnel."[11] *Ibid.* The Court

[11]The regulations of the Arkansas Department of Corrections dealing with Disciplinary Procedures (see Enclosure #5 of the Answer to Interrogatory #8, attached to the Answers to Interrogatories propounded to Defendants) provided:

"*Punitive Segregation*

Punitive segregation is ordinarily used as punishment when reprimands, loss of privileges, suspended sentences, and similar measures have been tried without satisfactory results. Punitive segregation is a major disciplinary measure and should be used judiciously when all other forms of action prove inadequate, where the safety of others is concerned, or when the serious nature of the offense makes it necessary.

Forms of Segregation

Segregation may take any one of the following forms:

1. *Punitive Segregation – special punishment –*

Confined inmates in a punishment status, placed on a restricted diet, with loss of privileges and placed in special facilities for a comparatively brief period. Ordinarily no inmate should be retained in punishment segregation on restrictive diet more than 15 days, and normally a shorter period is sufficient. Punitive segregation is *not* for indefinite or permanent segregation.

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found that such prisoners were rarely confined in the cell alone and that at times three or more inmates were kept in the small cell equipped with extremely limited facilities. Where three or more men were put in the same cell, one or two of them had to sleep on the floor.[12] The mattresses were removed during the day. *Id.* at 275-276.

The Court reviewed the diet of grue served as a punishment to inmates in punitive isolation in light of the Court of Appeals remand and concluded that it should no longer be served. *Id.* at 270-277. Inmates were fed grue during each fourteen day period, except that on every third day they were supposed to receive one regular prison meal. *Ibid.* Many inmates complained of short rations for this meal and of a practice

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A. Regular punitive segregation procedures

(1) Period of Confinement:

Fifteen days should be the maximum time spent in punitive segregation.

Recalcitrant inmates at the end of this period should be fed a normal diet. After two or three days, depending upon physical condition, he may be returned to a restricted diet and the procedure continued."

Department of Corrections officials interpreted the regulation as allowing an inmate to be kept in punitive isolation indefinitely as long as he was given regular meals for two days every 15 days. See, Testimony of A. L. Lockhart, Extract of Proceedings in *Graves v. Lockhart*, pp. 95-96, 100.

[12]See Defendants' Response to Request for Admission of Fact (May 3, 1974) page 3, A. 219.

known "as shaking the spoon". *Id.* at 276, note 11. At the end of each fourteen days inmates were weighed to determined how much weight they had lost on the grue diet and if returned to punitive isolation were given regular food for two days before being returned to the grue diet on the seventeenth day. Virtually all inmates lost weight on this diet.[13] Id. at 276, note 12. Inmates were allowed very limited outdoor exercise and left their cells on every third day to take a shower. Inmates in punitive isolation were denied practically all privileges; they could receive visits only from clergymen which were very rare and could receive only "constitutionally protected" mail.[14] The Court found the punitive wing was frequently the scene of violence with prisoners screaming and cursing at guards, attempting to assault and injure them and the guards retaliating with night sticks and mace, frequently with excessive responses.[15] Id. at 276-277. The Court criticized the

[13]Defendants admitted that the caloric value of the grue served each day was approximately 962 calories, Answers to Interrogatories Propounded to Defendants (May 30, 1974), p. 7, A. p. 227, and that "plaintiffs, while inmates in the 'punitive wing' of the Cummins Prison Farm, have generally and uniformally [sic] suffered weight loss." Defendants' Response to Request for Admission of Fact (May 3, 1974) p. 2, A. p. 218.

[14]It was admitted that inmates were not allowed to receive personal mail while serving time in the punitive wing. Defendants' Response To Request For Admission of Fact (May 3, 1974), p. 3, A. p. 219.

[15]Much of the testimony, including that of defendants' witnesses, related to various incidents of violence in the punitive wing. See, e.g., the testimony of A. L. Cummins, in the Extract of Proceedings in *Graves v. Lockhart*, at pp. 47-53.

lack of professionalism and commonsense among the maximum security personnel. *Id.* at 277. The Court agreed with the testimony of Dr. Arthur Rogers, a clinical psychologist, who testified as plaintiff's expert in the 1974 *Graves* hearings that punitive isolation as practiced at Cummins "serves no rehabilitative purpose, and that it is counterproductive. It makes bad men worse. It must be changed."[16] *id.* at 277.

The Third Supplemental Decree prohibited the continued use of grue and required that inmates be served food of the same quality as that supplied to inmates in the general population. The Court ordered that defendants provide inmates in punitive isolation further opportunity for physical exercise outside their cells. Finally, the Court enjoined the confinement of inmates in punitive isolation for indeterminate periods. The[17] Court's decision was that indeterminate periods

[16]See, generally, the testimony of Arthur Rogers, set out in the Extract of Proceedings in *Graves v. Lockhart*, at pages 3-20.

[17]The Third Supplemental Decree provided (A. 183-185):

"*Punitive Isolation.*

Respondents will be, and they hereby are, enjoined from sentencing inmates of the Departments to confinement in punitive isolation for indeterminate periods of time. In the future an inmate who is convicted of a major disciplinary infraction may be sentenced to confinement in punitive isolation for a period of not more than thirty days; at the end of that maximum period he must be returned to general population, or, if it be found necessary, he may be held in a segregated status under maximum security conditions other than punitive. No disciplinary committee or panel is required to sentence an inmate to confinement in punitive isolation for as much as thirty days, and the Superintendent of the institution or the Commissioner is free to release an inmate from punitive isolation at any time prior to the expiration of his sentence.

(continued)

of confinement under these conditions was unreasonable and unconstitutional. 410 F. Supp. at 278. The

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Inmates who have been confined in punitive isolation for more than thirty days when this Decree is filed are to be released to population or held in maximum security but under conditions that are not punitive. Inmates who have not been confined in punitive isolation for thirty days or longer will be considered as serving sentences of not more than thirty days. In determining whether an inmate has been in isolation for thirty days or longer, the two day periods of "interruption" mentioned in the Opinion will be included in the calculation.

Respondents will be, and they hereby are, enjoined from supplying inmates confined in punitive isolation with food and water inadequate in quantity and quality to preserve their health, and are further enjoined from serving such inmates diets which differ qualitatively from food supplied to inmates in general population. Without limiting the generality of the foregoing, the use of the substance known as "grue", or any variant thereof, as a food for inmates in punitive isolation is specifically enjoined.

Respondents will be, and they hereby are, directed and required to afford inmates in punitive isolation reasonably adequate opportunites for physical exercise outside their cells, including reasonable amounts of outdoor exercise when weather permits.

Lest there be any mistake about the matter, respondents will be, and they hereby are, enjoined from confining in any cell in any of the three wings of the East Building at Cummins, in circumstances other than exceptional and then for only short periods of time, more than two men at the same time, and respondents will be, and are, required to provide each man so confined with a bunk and mattress.

Respondents will be, and they hereby are, directed and required to evaluate and periodically re-evaluate the cases of inmates confined in what the court has called the "third wing" of the East Building, (Opinion page 60) as prescribed on pages 62-64 of the Opinion, and to take appropriate actions based on such evaluations and re-evaluations.

Court acknowledged that some inmates must be segregated from the general population for various reasons "and does not condemn that practice". *Ibid.* "But segregated confinement under maximum security conditions is one thing; segregated confinement under the punitive conditions that have been described is quite another thing." *Ibid.* The Court made clear that it was not prohibiting all segregating of unruly prisoners from general population and referred to the Eighth Circuit's controlling decision relating to so-called "administrative segregation", e.g., *Kelly v. Brewer*, 525 F.2d 394 (8th Cir. 1975). See 410 F. Supp. at 278. Judge Henley based his decision to limit the time in punitive isolation to thirty days on the testimony of Mr. Hutto taken in conjunction with the various changes that were ordered in conditions in that wing. The Court stated:

"As to the length of the maximum sentences that maybe imposed, the court notes that Mr. Hutto is of the view that basically the maximum period of time in which a man should be confined in punitive isolation with a restricted diet, with no mattress in the daytime, and perhaps without a bunk to sleep in at night is fourteen days. In view of the changes in the confinement in punitive isolation that the court is ordering, the court feels that a maximum sentence of thirty days is permissible. If at the end of that maximum period, it is found that an inmate should not be returned to population, he may be kept segregated but

under conditions which are not punitive." (410 F. Supp. at 276).[18]

The Court pointed out that less than thirty day sentences might be imposed and also that inmates might be prosecuted for felonies if they committed serious crimes while in prison. 410 F. Supp. at 278.

Judge Henley also used the thirty day limit on punitive confinement as a part of the method of dealing with unconstitutional overcrowding. "As far as the punitive wing and the administrative segregation wings of the East Building are concerned, the directives of the Court in the immediately preceding section hereof ought to take care of the problem of overcrowding." 410 F. Supp. at 278.

In the third wing, which would probably be called "administrative segregation" in most institutions but in Arkansas was merely referred to as the "third wing" or "maximum security" wing, the Court also ordered certain changes. Here the Court ordered periodic evaluation of the situation of convicts who could not be safely returned to the general population in accord with the Eighth Circuit's ruling in *Kelly v. Brewer, supra.*

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[18]Indeed, the report filed by the defendants following the Third Supplemental Decree states that an inquiry showed that there was no one at any institution on punitive isolation who had been there for more than 30 days at the time of the Court's Order. See, Response filed by the Defendants in *Finney v. Hutto*, July 14, 1976, Commissioner's Report to the Court as Directed in the Third Supplemental Decree at p. 5, dealing with punitive isolation.

In the Clarifying Memorandum Opinion of April 2, 1976, the Court responded to an inquiry from the defendants about how to deal with prisoners who committed infractions while in punitive isolation. The Court stated that if an inmate in punitive isolation commits a serious infraction he may be proceeded against in a disciplinary proceeding just as though the offense had been committed by an inmate in the general population. A. 190. If an inmate is found guilty the Court stated he may be sentenced to an additional time in punitive confinement beyond the basic thirty day maximum period specified in the Third Supplemental Decree. *Ibid.* The Court however warned the defendants to move slowly and sparingly in this area, and not to use the major disciplinary procedures followed by consecutive sentences as a means of evading the prohibition against indeterminate sentences. The Court stated that if the imposition of consecutive sentences became a matter of common practice it would be constitutionally suspect and call for additional judicial attention. *Ibid.*

The Court also clarified its order with respect to food to provide that inmates in punitive isolation not be required to be served exactly the same food or the same size portions or have the same choice of dishes as other inmates but the Court did require that inmates be served adequate meals in punitive confinement and warned against the practice of deliberately serving short rations. A. 191-192.

The Court's ruling on attorneys' fees is set forth in 410 F. Supp. at 281-285. The Court noted that Mr. McMath who was appointed in 1974 had received no fee for his work and that Messrs. Holt and Kaplan had

received no fee for their work on the *Holt III* appeal or any subsequent work. The Court noted that its 1973 award of fees had been based in part upon the "private attorney general" theory and that *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) required a reexamination of the Court's power to award such a fee. The Court concluded that the bad faith exception to the American Rule, recognized in *Alyeska*, justified the award of a counsel fee in this case. 410 F. Supp. at 284. The Court noted that the attorneys involved had been in the protracted case only because they had been appointed; that the litigation had been needed to bring about the erratic course of improvement in the Arkansas prison system from 1965 to date; that the litigation brought to light problems which would have been otherwise overlooked; that there had been a hardening of the previously cooperative attitude of the prison administrators and an unwillingness to go forward with necessary improvements; that at "practically every stage of the litigation evidence has brought to light practices of which those in higher prison authority were ignorant, and which they eliminated when the facts were disclosed"; that the authorities should have themselves discovered some of those practices without waiting for them to be developed in the lawsuit by plaintiffs' attorneys. *Id.* at 284-285. The Court stated that in fixing the amount of the fee it was making no effort "to adequately compensate counsel for the work that they have done or for the time that they have spent on the case" because adequate compensation "would run into many thousands of dollars." *Id.* at 285. The Court stated it did wish to

allow more than a nominal fee and accordingly awarded $20,000.00 to be divided between the three attorneys and to be paid out of Department of Corrections funds. The Court also ordered the State to pay for the cost of a transcript of depositions and testimony. The Court noted that much of the testimony heard in 1974 and 1975 had not been transcribed. 410 F. Supp. at 285, note 14.

On appeal by the defendants the Eighth Circuit affirmed on January 6, 1977. *Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977). The defendants contested the aspects of the decree which prohibited indeterminate confinement in punitive isolation and which awarded attorneys' fees and costs. The Eighth Circuit accepted Judge Henley's description of the conditions in punitive isolation and affirmed his conclusion that indefinite confinement in those conditions for more than thirty days was cruel and unusual punishment. The Court affirmed the award of attorneys fees reasoning that the award was justified by the recently enacted Civil Rights Attorney's Fee Awards Act of 1976, codified as 42 U.S.C. §1988. The Court reasoned that the award was not barred by the Eleventh Amendment based upon this Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The Court also found that the record fully supported the District Court's finding that the conduct of the defendants justified an award under the bad faith exception enumerated in the *Alyeska* case. 548 F.2d at 742, n. 6. Finally, the Court found the award of costs permissible under the Eleventh Amendment citing *Fairmont Creamery Company v. Minnesota*, 275 U.S. 70 (1927). The Court of Appeals awarded the appointed counsel an additional $2,500.00 for their services on the appeal.

On October 17, 1977, this Court granted a petition for certiorari filed by the defendants *Hutto et al.*

SUMMARY OF ARGUMENT

I. A. The Eighth Amendment limits the prison conditions in which an inmate may be confined. Because the prisoner, by reason of the deprivation of his liberty, cannot provide for himself, prison authorities must furnish such essentials as food, clothing, shelter, sanitary facilities, and medical treatment. *Estelle v. Gamble*, 50 L.Ed.2d 251 (1977).

B. The disputed 30 day limitation on punitive segregation was part of the court ordered remedy for the unconstitutional conditions the District Court found in the punitive facilities in 1976. Petitioners do not question the holding of the lower courts that the 1976 conditions constituted cruel and unusual punishment. The principle elements on which the District Court based its finding of a constitutional violation included severe overcrowding, the lack of an adequate diet, and physical attacks on inmates by guards and other inmates.

C. The District Court did not hold that indefinite punitive segregation was a *per se* violation. The Court merely imposed the 30 day limitation in light of the conditions at the particular punitive facilities involved.

D. The 30 day limitation was reasonably adapted to remedy the proven violation. The 30 day rule limited the extent to which an inmate would be subject to the conditions found by the District Court, many of which would have been difficult to alter directly. The

limitation also lowered the average population in the punitive facilities and thus reduced the degree of overcrowding. This was a less intrusive remedy than attempting to regulate and monitor in great detail the events and practices in the punitive facilities.

II. A. The District Court awarded respondents counsel fees because the defendants had acted in bad faith and directed that petitioners pay that award out of state funds under their control. The finding of bad faith was affirmed by the Court of Appeals and is not questioned here. The general authority of the federal courts to award fees in light of such conduct is well established. *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 259 (1975).

The Eleventh Amendment does not preclude such an award of counsel fees. State officials may be directed to make expenditures from public funds under their control so long as that expenditure is "ancillary" to the injunctive relief. *Milliken v. Bradley*, 53 L.Ed.2d 745 (1977). This Court, by its decisions and practice, has long recognized that costs are ancillary and thus may be awarded against a state. *Fairmont Creamery v. State of Minnesota*, 275 U.S. 70. Counsel fees where awardable are traditionally regarded as part of costs. Like costs counsel fees are not the gravamen of an action, are not incurred to a significant degree if the action is resolved immediately after filing, and are not measured in terms of the monetary loss resulting from the defendant's violation of a legal duty.

If, as petitioners contend, counsel fees must be regarded as a form of damages, the state is obligated by Arkansas Act 543 of 1977 to pay such award on behalf of petitioner Hutto.

Respondents maintain that the enactment of the Fourteenth Amendment worked a *pro tanto* repeal of the Eleventh Amendment. If, however, the Court concludes that counsel fee awards are not subject to the Eleventh Amendment, this question need not be reached.

B. The Civil Rights Attorneys Fees Award Act of 1976, P.L. 94-559, was adopted in the wake of the *Alyeska* decision to provide in 42 U.S.C. §1983 cases an express congressional authorization for awards of counsel fees to lawyers acting as private attorneys general. The court of appeals upheld the award of counsel fees in light of this statute.

Although P.L. 94-559 does not specify against whom fee awards are to be made, such awards of costs are traditionally made, not only against the named defendant, but also against an interested party which interjects itself into the case and controls the litigation. *Souffront v. Compagnie des Suceries*, 217 U.S. 475 (1910). In §1983 cases the city or state involved commonly interjects itself into the case in this manner. The House and Senate Reports regarding P.L. 94-559 expressly state that city or state funds should be used to pay counsel fee awards in civil rights actions in which the named defendant is a city or state official.

Congress has the authority under section 5 of the Fourteenth Amendment to subject states to monetary awards in federal court. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The legislative history demonstrates that Congress intended to invoke that authority.

Despite the clear intent and authority of Congress, petitioners urge that Congress failed to frame the statute in a manner sufficient to achieve its purpose.

The decisions of this Court do not require that Congress exercise the power recognized in *Fitzpatrick* through any special technical language. It is sufficient that, as here, the intent of Congress is clear. If petitioners' construction of P.L. 94-559 were accepted state officials would be personally liable for often substantial fees regardless of whether they had acted in good faith or had any control over the conduct of the litigation.

The application of P.L. 94-559 to the instant case is required by the general rule that new legislation be applied to pending litigation. *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974). The legislative history of the statute demonstrates that Congress intended that it be so applied. The application of the law to this case involves no "manifest injustice", since petitioners were on notice that such fees might be awarded and do not claim they would have operated the prisons differently had that not been the case.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY FORBADE THE USE OF INDEFINITE PUNITIVE SEGREGATION AS PART OF ITS REMEDY FOR THE UNCONSTITUTIONAL CONDITIONS IN THE PUNITIVE FACILITIES

A. The Cruel and Unusual Punishment Clause of the Eighth Amendment, which limits both how long[19] and whether[20] a person can be sentenced to jail, restricts as well the treatment to which he can be subjected while so incarcerated. The prohibition has not been confined to the barbarous methods of torture and mutilation generally outlawed in the 18th Century, but prohibits practices repugnant to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Confinement in a penitentiary necessarily entails a loss of most of the comforts enjoyed by free men; the very purpose of such incarceration may require that it not be a pleasant experience. But such punishment, if [illegible]t be the goal of incarceration, may not inclu[illegible]cessary and wanton infliction of pain". *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The Eighth Amendment "cover[s] conditions of confinement which may make intolerable an otherwise constitutional imprisonment." *Ingraham v. Wright*, 51 L.Ed.2d 711, 729, n. 38 (1977).

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[19] *Weems v. United States*, 217 U.S. 349 (1910).

[20] *Robinson v. California*, 370 U.S. 660 (1962).

As this Court recognized in *Estelle v. Gamble*, 50 L.Ed.2d 251, precisely because an inmate is incarcerated he must rely on prison authorities to meet his basic needs, for "if the authorities fail to do so, those needs will not be met." 50 L.Ed.2d at 259. *Estelle* held that the Eighth Amendment requires the government "to provide medical care for those whom it is punishing by incarceration." *Id.* In *Costello v. Wainwright*, 51 L.Ed.2d 372 (1977), the Court recognized that the overcrowding of prison cells could reach such a degree that the constitution would be violated. The obligation of prison authorities recognized by *Estelle* is not limited to the provision of medical care, but includes all basic necessities of life: food, clothing, shelter, sanitary and washing facilities, and opportunity for a modicum of exercise. Modern standards of decency, as reflected in the practices generally employed and approved by prison authorities, correctional experts, and others[21]

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[21] National Advisory Commission on Criminal Justice Standards and Goals, Corrections, pp. 31 (clothing, bedding, light, ventilation, food), 34 (shelter, heat, light, showers, exercise) (1973); American Bar Association, Tentative Draft of Standards Relating to the Legal Status of Prisoners, §§6.9 (shelter, physical safety), 6.12 (sanitation, heat, light, food, washing facilities, bedding, exercise) (1977); American Correctional Association, Manual of Correctional Standards, pp. 444-56 (food), 463 (bedding), 463-4 (washing facilities), 519-39 (exercise) (1972); National Council on Crime and Delinquency, Model Act for the Protection of Rights of Prisoners, §1(b) (food, shelter, physical safety, sanitation, ventilation, light, exercise) (1972); Model Penal Code, §304.5(2) (food, clothing); Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, §§9 (shelter, overcrowding), 10 (heat, light, ventilation), 11 (sanitation), 13 (washing facilities), 19

(continued)

insist that society "be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself." *Estelle v. Gamble*, 50 L.Ed.2d at 260.[22] A deprivation of such necessities, like a withholding of medical care, is a form of punishment which cannot be resorted to for any offense or infraction.[23]

(footnote continued from preceding page)
(bedding), 20(1) (food), 21(1) (exercise) (1955). National Sheriff's Association, Manual on Jail Administration, §§IX(5) (clothing) XIX (food), XX(ii) (sanitation), XX(12) (washing facilities), XXI(8) (exercise) (1970).

The United States is committed by the Geneva Convention to providing such necessities to prisoners of war. 6 United States Treaties 3317, 3328 (humane treatment, protection against violence), 3334 (food, water, clothing), 3336 (hygienic and healthful shelter), 3338 (bedding, blankets, housing, light, heat), 3340 (food, water, clothing), 3342 (sanitation), washing facilities, 3348 (exercise) (1949).

[22]The lower Federal courts have concurred in that assessment. See, e.g., *Newman v. Alabama*, 559 F.2d 283, 286, 291 (5th Cir. 1977); *Gates v. Collier*, 501 F.2d 1291, 1302, 1305 (5th Cir. 1974). Although these cases are primarily concerned with conditions which may produce physical suffering, Judge Feinberg has correctly observed that "In this Orwellian age, punishment that endangers sanity, no less than physical injury by the strap, is prohibited by the Constitution." *Sostre v. McGinnis*, 442 F.2d 178, 208 (2d Cir. 1971) (dissenting opinion).

[23]Such a deprivation, like the use of torture, has no place in any part of a prison. Thus it is of no significance to this case that deprivations of this character occurred in punitive isolation rather than in other parts of the prisons. Since punishment of this sort is absolutely prohibited, the Court need not consider whether it was an excessive sanction for any class of disciplinary infractions, see *Coker v. Georgia*, 53 L.Ed.2d 982 (1977), or whether any particular infractions could not constitutionally be punished at all. *Robinson v. California*, 370 U.S. 660 (1962).

Unlike other constitutional questions concerning the operation of prisons, enforcing minimal standards of food, clothing, shelter and the like will not ordinarily affect the responsibilities of prison administrators "for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating . . . inmates placed in their custody." *Procunier v. Martinez*, 416 U.S. 396, 404 (1974). Any impact of the elimination of brutalizing conditions is likely to be, as the District Court found here, conducive to the increased efficiency and safety of the institution. This is true, not only because giving an inmate a wholesome diet or a bed to sleep on will not encourage or facilitate a breach of security, but because ordinarily a prison's failure to do so arises not from such traditional administrative concerns but from a shortage or misallocation of resources or a breakdown in centralized control of the prison staff. In the instant case, for example, the uniquely deplorable conditions discovered in 1969, including the use of armed convicts as guards, was the result of the refusal of the Arkansas legislature to appropriate any funds whatever for the operation of the prison system, which was forced to operate from the proceeds of convict labor. 309 F. Supp. at 372-381. The District Court proceedings and other developments led to the appropriation of such funds which in turn enabled the prison authorities both to comply with the Constitution and to operate the prison in a manner more consistent with their professional judgment. The Constitution does not require the states to establish and operate prisons, but where they choose to do so they must provide the

resources necessary to fall within the limits set by the Eighth Amendment.[24]

Neither this nor other cases concerning the provision of basic necessities for prisoners involves a possible thwarting of the judgment, of particular importance under Eighth Amendment, of the people or legislature of the State involved. See *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976). No state statute required the particular conditions found at Cummins or Tucker. State laws touching on the conditions of confinement generally set minimum, not maximum, standards; some like those of Arkansas[25] are generalized requirements of decent treatment, while others are more detailed.[26] Where, as in Arkansas,[27] those statutes are supplemented by administrative regulations, the regulations

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[24]See *Gates v. Collier*, 501 F.2d 1291, 1319-22 (5th Cir. 1974).

[25]Ark. Stat. Ann. §46-116 requires that "Persons committed to the institutional care of the Department shall be dealt with humanely with efforts directed to their rehabilitation."

[26]See, e.g., New York Corrections Law §137 (1977 Supp.).

[27]The operation of all jails and prisons, including those under the control of the Department of Corrections, is subject to the rules and regulations of the Arkansas Criminal Detention Facilities Board, which is charged by statute with the obligation "[t]o develop minimum standards for the construction, maintenance and operation of such criminal detention facilities." 4A Ark. Stat. Anno. §§46-1201, 1204(f) (1975 Supp.). The conditions condemned by the district court appear to have violated the Board's standards as well as the Eighth Amendment. See notes 30-32 *infra*. See also *Wright v. McMann*, 460 F.2d 126, 131 (2d Cir. 1972), *cert. denied* 409 U.S. 885 (1972).

contain minimum rather than maximum standards. Thus in litigation regarding the constitutionality of prison conditions, those conditions do not ordinarily come with the imprimatur of societal endorsements which exists in the case of punishments adopted by a legislature. *Gregg v. Georgia*, 428 U.S. at 179-80. Because prisons, unlike other institutions, are usually operated on a closed basis with little opportunity for scrutiny by the public[28] or legislature, the severity of those conditions is rarely tested against community standards, and the judicial enforcement of the prohibition against cruel and unusual punishment will frequently be the only meaningful check on abuses inconsistent with the standards of decency embodied in the Eighth Amendment and prevalent in the community in which the prison operates. See *Ingraham v. Wright*, 51 L.Ed.2d 711, 729-30 (1977).

Application of the constitutional requirements to the circumstances at a particular facility will raise a variety of factual and legal issues. Some practices, such as the deliberate withholding of medical attention, are *per se* violations of the Eighth Amendment. *Estelle v. Gamble*, 50 L.Ed.2d 251 (1977). Assessing other possible abuses, such as an alleged inadequacy of food or heat, will involve a question of degree. In other cases, although no single practice may violate the Constitution, the combined effect of several practices may do so. *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974). Some

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[28]See *Newman v. Alabama*, 559 F.2d 283, 288 (5th Cir. 1977) ("We cannot believe that the good people of a great state approved the prison situation demonstrated by the evidence in this case").

conditions, while not unconstitutional as a general practice, may be intolerable as applied to a particular inmate; thus although there is nothing wrong in the abstract with prison diet rich in sugar, it would be cruel and unusual punishment to provide only such food to a diabetic inmate. See *Sostre v. McGinnis*, 442 F.2d 178, 193, n. 23 (2d Cir. 1971).

B. The District Court concluded that the conditions which existed in 1976 in punitive segregation constituted cruel and unusual punishment. That conclusion was reached reluctantly, and was based on many weeks of hearings over seven years which, together with at least one personal inspection of the prison facilities involved, gave the District Judge a unique knowledge of the facts. The District Court's conclusions were upheld by the Court of Appeals, which had also acquired a familiarity with the Arkansas prisons through a series of previous appeals in this and other cases. Petitioners do not here challenge the concurrent determination of the two courts below regarding the nature of punitive segregation as of 1976. In order, however, to assess the propriety of the 30 day limitation, it is necessary to review the circumstances which gave rise to the finding of a constitutional violation.

The problems with which the District Court was particularly concerned were overcrowding,[29] an inade-

[29]Overcrowding which serves no conceivable penological purpose, is among the most common causes of unconstitutional prison conditions. See, e.g., *Costello v. Wainwright*, 51 L.Ed.2d 372 (1977); *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977); *Williams v. Edwards*, 547 F.2d 1206, 1211, 1215 (5th Cir. 1977).

quate diet and pervasive violence. Although the cells in the punitive wing at Cummins were originally designed for one inmate each, see n. 19, *supra*, and had at most two beds, *id.* at 275-276, they were at times used to house three or four inmates.[30] Thus frequently one or two inmates were required to sleep on the floor. The Court noted that:

> [convicts] being what they are, that means that the stronger and more aggressive inmates are going to occupy the bunks, and they are also likely to persecute the weaker inmate or inmates. A variant of this is that where three convicts are confined in a single cell, two of them are apt to team up against the third one. 410 F. Supp. at 276.

The "grue" fed to inmates was alleged to contain ingredients sufficient for adequate nutrition, but the amount of grue served together with 4 slices of bread provided only 962 calories a day.[31] Although this diet

[30]The Adult Detention Facility Minimum Standards for long term facilities, promulgated in December 1975 by the Arkansas Criminal Detention Facilities Board, provided in part: "The design of buildings should provide single occupancy rooms with a floor area of at least (70) seventy square feet per room and a clear floor-to-ceiling height of (8) eight feet in the interior." §15-1023, p. 48. See n. 27, *supra*.

[31]The average adult male needs between 2200 and 2900 calories a day. The American Correctional Association Manual of Correctional Standards urges that prisoners in punitive segregation receive at least 3,100 calories a day. P.420 (1972). The National Council on Crime and Delinquency's recommended standards for prisoners in solitary confinement would require at least 2500 calories a day. Model Act for the Protection of Rights of Prisoners, §3(a) (1972). See also *Gates v. Collier*, 501 F.2d 1291, 1305 (5th Cir. 1974) (requires at least 2000 calories a day for prisoners in solitary confinement).

was supplemented every third day with a regular meal, there was substantial evidence that the guards deliberately gave only a partial serving of that meal to some inmates. 410 F. Supp. at 276, n. 11. Practically all inmates on a grue diet in punitive isolation lost weight. The extent to which this loss was due to the nutritive value of grue, and/or to the inability or unwillingness of inmates to eat that deliberately unappetizing paste-like concoction, is unclear.[32] Petitioners themselves recognized that the actual nutritional intake of inmates in punitive segregation was such as to require a thorough physical examination every two weeks. 505 F.2d at 207. The Court of Appeals had earlier compared grue to a bread and water diet which was "not seriously defended as essential to security . . . [and] amount[ed] therefore to an unnecessary infliction of pain." 505 F.2d at 207, n. 9. It is clear that the use of grue served no purpose other than to punish inmates through a form of controlled but chronic malnutrition; the role of the medical personnel was not to prevent this partial starvation, but merely to

[32]Section 10-1001 of the Adult Detention Facility Minimum Standards, *supra*, n. 27, states: "A good food program shall be one of the Facility administrator's primary concerns; because of its effect on health, welfare, discipline and morale. . . . The inmates' food shall provide the nutrients needed for optimum health and should be plentiful and of a wide variety, well prepared, and well served." P. 37.

assure that it did not cause death or permanent injury.[33]

The Court also found that its previous injunctive orders had apparently been disobeyed. Despite an earlier prohibition against brutality, it concluded prison guards continued to use excessive force. 410 F. Supp. at 277. Notwithstanding a prior directive that Muslim inmates enjoy the same right to practice their religion, and meet with clergy, as inmates of other faiths, there was substantial evidence that discrimination against them continued. 410 F. Supp. at 280-81. Although racial discrimination against inmates had already been prohibited, the Court felt that covert discrimination had not ended. 410 F. Supp. at 268. The District Court noted a number of other practices which aggravated these more pronounced abuses, including a lack of repairs, inadequate training and rotation of guards, and the employment of an overwhelmingly white work force to run the heavily black prisons. 410 F. Supp. at 265-68, 277, 280. The Court also noted that the overcrowding and sanitary conditions in the punitive wing contributed to the spread of contagious diseases. 410 F. Supp. at 258-9.

[33]The special diet, even if nutritionally adequate, would still present serious constitutional difficulty. Forcing inmates to eat food deliberately prepared in an offensive or unpalatable manner is a form of punishment offensive and largely unknown to civilized practice. The "recipe" for grue is similar to the practice condemned by the American Correctional Association of "Mix[ing] several types of foods together in a dish so that the prisoner's fare closely resembles a meal set out for an animal to eat." *Manual of Correctional Standards*, p. 420 (1972).

The injunctive relief awarded by the District Court was considerably narrower than the wide range of practices which gave rise to the constitutional violation. The Court forbade the housing of more than two men in a one-man cell except in an emergency,[34] stopped the serving of grue and directed the petitioners to provide inmates with a nutritionally adequate diet,[35] and limited the period during which an inmate could be confined in punitive isolation to 30 days.[36] The Court reaffirmed, but did not significantly expand, its previous injunction against racial and religious discrimination. The petitioners were instructed to "do more" about recruiting minority guards, but were left free to decide how this should be done. The Court ordered the petitioners to arrange for a study for the medical and sanitary conditions at the prisons, including the punitive wing at Cummins, but again the petitioners were made initially responsible for framing the study and implementing any resulting recommendations. Although the District Judge made clear his concern that changes were necessary in other areas, the court's injunction did not require the petitioners to take any specific action regarding the rotation, training, or number of guards, or the repairing of broken or worn out facilities, and merely noted the Court of Appeals' concern about the levels of light, heat and ventilation. Thus, to a substantial degree the District Court continued its earlier approach of noting the existence of constitutionally suspect practices but refraining from issuing

[34]410 F. Supp. at 277.

[35]410 F. Supp. at 277.

[36]410 F. Supp. at 278.

detailed injunctive requirements in the hope that petitioners would act without them.[37]

C. There are a number of important issues of constitutional law which, although suggested by petitioners' brief, are not presented by this case and were not the subject of the proceedings below.

This case does not present the question of whether indefinite punitive segregation is unconstitutional *per se*.[38] The district court was not asked to fashion, and did not adopt, any such *per se* rule. Its opinion declared only that "segregated confinement under the punitive conditions that had been described" in its exhaustive opinion violated the Eighth Amendment. 410 F. Supp. at 278. The primary if not exclusive impact of this decision is on the operation of the East Building at the Cummins facility.[39] While other lower courts in other cases have been asked to declare such indefinite isolation impermissible in all cases, no such determination was made in this case. Even those courts

[37]We do not suggest that this approach was necessary or even proper. On the contrary, while a district court may properly invite prison officials to submit a remedial plan, and take note of their comments on plans that may be prepared by another party or the court, the court must assure that some plan to remedy the constitutional violation is put into effect as soon as practicable after the finding of liability. See *Green v. School Board of New Kent County*, 391 U.S. 430, 439 (1968).

[38]The petition for writ of certiorari, and petitioners' phrasing of the Third Question Presented, may have suggested this was the substantive issue in controversy.

[39]At the time of the court's opinion only 3 inmates were in punitive isolation at Tucker. See note 18 *supra*.

which have addressed that issue and concluded that indefinite segregation is not unlawful *per se* have emphasized that such segregation might be unconstitutional "depending on the conditions of segregation". *Sostre v. McGinnis*, 442 F.2d 178, 193, n. 23 (2d Cir. 1971).

There is no dispute in this case as to whether the 30 days of punitive isolation permitted by the District Court is too short to serve as adequate punishment for any particular major infraction.[40] If, as we urge *infra*, some limit on the use of punitive segregation was appropriate, petitioners do not urge that a period other than 30 days should have been chosen. On the contrary, petitioners' own internal regulations prohibit the imposition for a particular offense of more than 15 days of punitive isolation. See, note 11 *supra*. The maximum period set by the District Court was consistent with those suggested by corrections experts.[41] As the District Court noted, its order does not

[40]Petitioners' Notice of Appeal limited the substantive issue on which review was sought to those portions of the district court orders which "prohibit the sentencing of inmates to confinement in punitive isolation for indeterminate periods of time for major disciplinary infractions." Although this suggested that petitioners sought on appeal only the right to impose a sentence over 30 days *for a particular infraction*, petitioners, as we note, have never had such a practice.

[41]See, e.g., American Correctional Association, Manual of Correctional Standards, 414-15 (maximum 15 days); American Law Institute, Model Penal Code §304.7(3) (Proposed Official Draft 1962) (Maximum 30 days); American Bar Association, Standards Relating to the Status of Prisoners (Tentative Draft), §3.2(a)(iii) (30 days). National Advisory Commission Criminal Justice Standards and Goals, Corrections, p. 31 (10 days).

The maximum period of punitive confinement permitted by the Geneva Convention Relative to the Treatment of Prisoners of War is also 30 days. 6 United States Treaties 3317, 3364 (1949).

interfere with the use of administrative segregation or criminal prosecution to punish offenses in lieu of, or in addition to, up to 30 days of punitive isolation. 410 F. Supp. at 278.

The District Court's order presents no significant limitation on the ability of petitioners to punish a series of major infractions. Ten days after the District Court entered the lengthy opinion of March 19, 1976, reported at 410 F. Supp. 251, petitioners filed a Motion to Alter or Vacate. Item IV of that motion stated:

> Respondents respectfully request that the Court clarify its injunction prohibiting incarceration of inmates on punitive [segregation] not to exceed thirty days. The respondents are unclear as to the proper procedure to follow if an inmate commits a new disciplinary offense warranting an additional sentence of punitive segregation while incarcerated in punitive segregation.

The District Court issued a Clarifying Memorandum Opinion on April 2, 1976, making clear that the petitioners could impose successive sentences for successive major infractions:

> If an inmate confined in punitive isolation or punitive segregation commits while so confined a serious or major disciplinary infraction, and particularly one involving violence or attempted violence directed at prison personnel or other inmates or one involving serious vandalism directed against state property, the inmate may be proceeded against in a major disciplinary proceeding, with notice and hearing, just as though the offense had been committed by the inmate while living in general population. And if he is found guilty he may be sentenced to additional time in

> punitive confinement, which time may extend beyond the expiration of the basic maximum thirty day period specified in the court's Third Supplemental Decree.[42]

The District Court cautioned that this authority was not to be abused to circumvent the 30 day limitation.[43]

The practice which was ended by the district court, and which is the subject of this appeal, was one of confining an inmate in punitive isolation for an indefinite period until prison authorities were persuaded that the inmate had developed "the proper attitude". The District Court found that

> [w]hile most inmates sentenced to punitive isolation are released to population within less than fourteen days, many remain in the status in question for weeks or months, depending upon their attitudes as appraised by prison personnel. 410 F. Supp. at 275.

The petitioners' written Disciplinary Procedures seem to contemplate this exception to their usual 15 day limitation on punitive segregation.

> Ordinarily no inmate should be retained in punitive segregation on restrictive diet more than 15 days, and normally a shorter period if sufficient. Punitive segregation is *not* for indefinite or permanent segregation. . . . Fifteen days should be the maximum time spent in punitive segregation. Recalcitrant inmates at the end of this period should be fed a normal diet. After two or three

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[42]Clarifying Memorandum Opinion, April 2, 1976, p. 3. A. 188.

[43]*Id*, pp. 3-4. A. 188.

> days, depending upon physical condition, he may be returned to a restricted diet and the procedure continued.[44]

Petitioner Hutto testified that punitive isolation for more than two weeks was used only for inmates who were "recalcitrant" and "hostile".[45] The sole practical effect of the contested portion of the District Court order was to restrict this use of punitive isolation; that order did not prohibit the use of any other methods for dealing with recalcitrant or hostile prisoners.[46] 410 F. Supp. at 278.

We have grave doubts as to the constitutionality of imposing any serious sanctions until an inmate changes a "bad attitude". This Court in *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974), held that an inmate was entitled prior to the use of solitary confinement or other "major changes in the conditions of confinement" to a written notice of charges, a written statement of the evidence relied on, and an opportunity to call witnesses and present documentary evidence. These procedures were not followed in making decision to retain for longer than 15 days an inmate with a "bad attitude", and it is difficult to see how they could have

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[44]Arkansas Department of Corrections, Disciplinary Procedures, p. 14.

[45]1975 Transcript, Volume 23, , p. 47.

[46]The District Court was not asked to consider and did not decide whether the use of indefinite administrative segregation for this purpose is constitutional. Although that question is thus not before this Court, respondents believe that that practice is also unlawful.

been in light of the vagueness of that standard.[47] Unlike a civil contempt proceeding, in which the incarcerated individual can obtain his release by agreeing to perform some clearly specified act, an inmate in punitive isolation may well have no idea what he must do to win his release. Punitive sanctions have traditionally been imposed in Anglo-American jurisdictions only for a specific prohibited action; the imposition of such a sanction for a "bad attitude" bears a great resemblance to the crime of status condemned in *Robinson v. California*, 370 U.S. 660 (1962). In the instant case, however, the general validity of this practice need not be decided, since the district court's decision imposing a 30 day limit on punitive isolation has the effect of precluding the use of punitive isolation for this purpose.

D. The issue thus presented by the 30 day limitation is whether the District Court exceeded its authority in including that provision in its order remedying the clear and undisputed constitutional violation. In fashioning a remedy for a constitutional violation "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Milliken v. Bradley*, 53 L.Ed.2d 745, 756 (1977). The District Court enjoyed considerable discretion in fashioning a workable and effective remedy so long as the means chosen was related to the constitutional violation, was designed to restore the

[47]For an example of the potential for abuse inherent in a policy of using indefinite sanctions to make a prisoner "subservient and break him down", see *Wright v. McMann*, 321 F. Supp. 127 (N.D. N.Y. 1970), *aff'd* 460 F.2d 126 (2d Cir. 1972), *cert. denied* 409 U.S. 885 (1972).

victims to the position they would have occupied in the absence of the violation, and did not unnecessarily interfere with legitimate prerogatives of state or local authorities. *Id.* at 755-756. Those requirements were clearly met in the instant case.

A violation of the constitutional prohibition against cruel and unusual conditions of incarceration is often a function of both the conditions of incarceration and the length of time the inmate is subjected to them. See 410 F. Supp. at 275. Denial of a bed, nutritious food, medical care, bathing facilities and/or exercise for several hours would not ordinarily raise constitutional problems, but such a denial for a period of weeks would amount to an impermissible "wanton and unnecessary infliction of pain". *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). While other deprivations might be lawful for even a period of weeks, "[i]n some instances, depending upon the conditions of the segregation, and the mental and physical health of the inmate, five days or even one day might prove to be constitutionally intolerable". *Sostre v. McGinnis*, 442 F.2d 178, 193, n. 23 (2d Cir. 1971). See also, *LaReau v. MacDougal*, 473 F.2d 974, 978 (2d Cir. 1972), *cert. den.* 414 U.S. 878 (1973). Where, as here, the conditions and period of incarceration combine to create a constitutional violation, a district court may seek directly to remedy that violation by ordering an amelioration of the intolerable conditions, a shortening of the period during which they may be endured, or both. In the instant case the district court acted reasonably in choosing the latter course.[48]

[48]A similar remedy was employed in *Gates v. Collier*, 501 F.2d 1291, 1305 (1974).

The 30 day limitation served as well to remedy for all inmates, however long their sentence to punitive segregation, the unconstitutional egregious overcrowding. The total population in the punitive wing at Cummins on any given day is a function of the number of inmates recently ordered into punitive segregation and of the length of each sentence. For example, if on the average, ten inmates a day are remanded for a period of 5 days, the average population in punitive will be 50; but if only one out of ten of these inmates is kept for 60 days rather than 5, the average population in punitive isolation would be 105. For this reason the District Court properly concluded that the 30 day limitation would greatly help to "take care of the problem of overcrowding" 410 F. Supp. at 278.[49]

Many of the abuses which contributed to the unconstitutionality of the punitive conditions were practices which it was particularly difficult for the District Court to detect or directly change; the 30 day limitation diminished the impact of these abuses in a manner more effective and less intrusive on the activities of the petitioners than an attempt by the district court to prescribe in great detail every operation of the punitive wing. The District Court's previous general injunctions against brutality and discrimination had not been fully complied with. Some portions of the 1976 order, forbidding certain practices for the first time, could not have been meaningfully monitored and

[49]In the hypothetical case described in the text application of the 30 day limitation would reduce the average population in punitive confinement from 105 to 75.

enforced without a substantial ongoing federal effort.[50] The District Court also noted a number of practices, such as the training and deployment of guards, which contributed substantially to the unconstitutional conditions, but which it was understandably reluctant to directly interfere with. The District Court could have issued detailed orders regarding these and other practices of which inmates had complained, enforcing those orders through reporting requirements, grievance machinery, or other means.[51] The District Court was free to choose, as it did, to reduce the unwarranted suffering caused by these practices by the simple expedient of reducing the amount of time any inmate could spend in the punitive wing where the resulting conditions prevailed. That choice was particularly appropriate in view of the difficulty which the District Court had already experienced in learning from the petitioners what they and their subordinates were doing in the institutions that were the subject of the litigation. See 410 F. Supp. at 275, 281.

Through the seven years of litigation prior to the 1976 decree the District Court, ever hopeful that the petitioners would take voluntary corrective action if the court brought the facts and laws to their attention,

[50]One of the more serious problems of which the inmates complained was that at least one guard gave inadequate portions of food to inmates he disliked by shaking the serving spoon. The problems of enforcing a ban on this practice are obvious. See 410 F. Supp. at 276, n. 11.

[51]See *Newman v. Alabama*, 559 F.2d 283, 290 (5th Cir. 1977) (authorizes appointment of a Federal monitor for each of the state prisons).

exhibited great reluctance to directly order the petitioners to conform their conduct to the constitutional requirements. That optimism, regrettably, proved unjustified; the hearing in 1975 revealed that the constitutional violations noted in earlier opinions, particularly overcrowding, continued. After waiting in vain for literally years for the petitioners to implement a plan of their own to deal with these conditions, the District Judge had no choice but to frame a remedy himself. That remedy, to a substantial degree, merely bound the petitioners to observe standards which they had established but not adhered to. The cells at the Cummins punitive wing were generally designed for one inmate each and had only two beds. 410 F. Supp. at 257. Defendants' written procedures forbade the use of indefinite punitive segregation and, provided, in light of the harsh conditions involved, that no inmate should ordinarily be kept there for more than 15 days. The District Court's Order, including establishing a 30 day maximum, assisted petitioners to bring their practices into conformity with their own principles, was the least intrusive injunctive order that would have remedied the constitutional violations, and was long overdue.

II.

THE DISTRICT COURT HAD THE AUTHORITY TO AWARD COUNSEL FEES AGAINST THE DEPARTMENT OF CORRECTION

The District Court awarded counsel fees because the petitioners had acted in bad faith. 410 F.Supp. at

281-285. The Court of Appeals held that such an award was also authorized by the Civil Rights Attorney's Fees Awards Act of 1976. 548 F.2d at 742. Each of these grounds provides an independent basis for sustaining the award.

A. Counsel Fees May Be Awarded Against State Officials Or Agencies Which Have Acted In Bad Faith

In *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), this Court reiterated the long standing rule that a court may assess counsel fees in a case in which the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . ." 421 U.S. at 259.[52] This rule has been applied to a variety of forms of conduct, including an intentional violation of the plaintiff's constitutional or statutory rights,[53] an inexcusable default on an

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[52]See also *Runyon v. McCrary*, 427 U.S. 160, 183 (1976); *F.D. Rich v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, n.5 (1968).

[53]The seminal case is *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951), cited with approval in *Rich*, 40 L.Ed.2 at 714, n.17, *Hall*, 412 U.S. at 5, and *Vaughn v. Atkinson*, 369 U.S. 527, 530 (1962). See also *Bell v. School Bd. of Powhatan County*, 321 F.2d 494 (4th Cir. 1963), cited with approval in *Rich* and *Hall*; *Richardson v. Communications Workers of America*, 530 F.2d 126, 132 (8th Cir. 1976); *Doe v. Poelker*, 515 F.2d 541, 547 (8th Cir., 1975).

obligation to remedy a past or existing violation,[54] an unjustifiable defense of clearly unlawful conduct,[55] or dilatory, fraudulent, or otherwise improper litigation tactics.[56] Each of these forms of bad faith unfairly burdens not only the adverse party but also the federal courts. Cf. *Illinois v. Allen*, 397 U.S. 337, 347 (1970).

In the instant case the District Court made a factual finding that the petitioners "have acted in bad faith and oppressively and that the case falls within the 'bad faith' exception to the *Alyeska* rule." 410 F.Supp. at 284. The District Court based this finding on several distinct grounds: (1) petitioners had operated "a patently unconstitutional prison system" prior to the commencement of this action (2) the petitioners had shown persistent and increasing unwillingness to remedy intolerable conditions unless ordered to do so by the court, (3) although the plaintiffs repeatedly brought to light through discovery patterns of misconduct so egregious that petitioners recognized they had to be corrected, petitioners inexplicably failed to make inquiries of their own into what was occurring in the prisons for which they were responsible,[57] (4) despite a series of hearings and written and oral orders from the

[54] *Bradley v. Richmond School Board*, 416 U.S. 696, 707, n.10 (1974); *Vaughn v. Atkinson*, 369 U.S. at 530-31; *McEnteggart v. Cataldo*, 451 F.2d 1109, 1112 (1st Cir. 1971), cited with approval in *Rich, Sims v. Amos*, 340 F.Supp. 691, 694 (N.D. Ala. 1972), aff'd 409 U.S. 942.

[55] *Newman v. Piggie Park Enterprises, supra; Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974).

[56] *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946).

[57] Compare *Matter of Yamashita*, 327 U.S. 1, 14-16 (1945).

court over the course of the litigation, constitutional violations continued. 410 F.Supp. at 284-285. In view of the District Judge's unique familiarity with the conduct and attitude of the petitioners garnered over 7 years from numerous hearings, his finding of bad faith is entitled to particularly great weight.

The Court of Appeals although relying primarily on the Civil Rights Attorney's Fees Awards Act, concluded that "the record fully supports the finding of the District Court that the conduct of the state officials justified the award under the bad faith exception enumerated in *Alyeska Pipeline Service Co. v. Wilderness Society.*" 548 F.2d at 742, n. 6. Such a concurrent finding of fact by two courts below is not subject to review in this Court in the absence of extraordinary circumstances not present here. *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); see *Runyon v. McCrary*, 427 U.S. 160, 184 (1976). The correctness of this finding does not appear to be questioned by petitioners.

The order of the district court provides

> The court now awards counsel for petitioners the sum of $20,000.00 as an attorneys' fee on account of services performed by them in this litigation since the remand resulting from *Finney v. Arkansas Board of Correction*, 505 F.2d 194 (8th Cir. 1974). The court also directs that counsel be reimbursed for the reasonable and necessary expenses paid or incurred by them, including the expenses of employing law students to assist in the preparation of the case, since the remand, but not to exceed $2,000.00. Counsel should be able to agree on the amount of the expenses; if not, they

> can take up the matter with the court. These awards are to be paid out of Department of Correction funds.

Counsel for petitioners here objects to the last sentence of this decree, directing that the fees and costs be paid out of the funds of the Department of Corrections which are under the control of the petitioners. If this objection is sustained the rest of the order will stand, and the award will still have to be paid by Mr. Hutto and the other petitioners, presumably out of their personal resources.[58] Counsel for petitioners asserts that, although petitioners may be directed to pay the awarded sum, they may not be directed to do so out of Department funds.

The question of whether counsel fees are among the remedies ordinarily precluded by the Eleventh Amendment has been before the Court on three previous occasions. In *Sims v. Amos*, 340 F.Supp. 691, 695 (N.D. Ala. 1972), counsel fees were awarded against elected Alabama state officials in their official capacity. The state attorney general appealed, claiming such an award was tantamount to the award of a money judgment against the State of Alabama in direct violation of the doctrine of sovereign immunity, but this Court unanimously affirmed the award without opinion. 409 U.S. 942.[59] In *Alyeska Pipeline Service*

[58]Unlike the situation in *Edelman v. Jordan*, 415 U.S. 651, 665 (1974), the payment of the award out of petitioners' personal funds is both possible, in light of the amount involved, and entirely justifiable, since the bad faith relates to the personal conduct of Mr. Hutto and his predecessors.

[59]This issue was discussed as well at the oral argument in *Edelman v. Jordan*, 415 U.S. 651 (1974), but was not mentioned in the opinions.

Co. v. The Wilderness Society, 421 U.S. 240 (1975), the majority, while finding no occasion to discuss the Eleventh Amendment issue 421 U.S. at 269, n. 44, noted that the award upheld in *Sims* rested in part, as here, on the bad faith of the defendants. 421 U.S. at 270, n. 46. In *Bitzer v. Matthews*, No. 75-283, decided *sub. nom. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the majority again did not reach the issue, 427 U.S. at 457, but Mr. Justice Stevens concurred on the ground that counsel fees, like other litigation costs, were not subject to the Eleventh Amendment. 427 U.S. at 460. Certiorari was granted to decide this issue in *Stanton v. Bond*, No. 75-1413, but the case was subsequently remanded for consideration of the Civil Rights Attorneys' Fees Act of 1976. 50 L.Ed.2d 581 (1976). The courts of appeals are divided on this question.[60]

As initially adopted section 2 of Article III provides in part that "[t]he judicial Power shall extend to all cases, in Law and Equity, arising . . . between a State

[60]Three circuits have held such awards permissible. *Souza v. Travisono*, 512 F.2d 1137 (1st Cir. 1975); *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974); *Jordan v. Fusari*, 496 F.2d 646 (2d Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). Two circuits have concluded that the Eleventh Amendment applied to such awards. *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974); *Taylor v. Perini*, 501 F.2d 899 (6th Cir. 1974); *Skehan v. Board of Trustees*, 503 F.2d 31 (3d Cir. 1974). Two circuits are divided. *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975) (awards permissible); *Hallmark Clinic v. North Carolina Dept. of Human Resources*, 519 F.2d 1315 (4th Cir. 1975) (awards prohibited); *Milburn v. Huecker*, 500 F.2d 1279 (5th Cir. 1974) (awards permissible); *Named Individual Member v. Texas Highway Dept.*, 496 F.2d 1017 (5th Cir. 1974).

and Citizens of another state . . . and between a State . . . and foreign . . . Citizens or Subjects." In 1798, in the wake *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1798), the Eleventh Amendment was adopted to repeal this language. Unchanged since then, the Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extent to any suit in law or equity, commenced or prosecuted against one of the United States by Citizen of another State or by Citizens or Subjects of any Foreign State.

Although the amendment, read literally, merely deletes the quoted language from Article III, it has been construed by this Court also to limit the judicial power under other clauses of Article III. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court extended the Eleventh Amendment immunity to suits against a state by its own citizens.[61] In *Hagood v. Southern*, 117 U.S. 52 (1886), the Court held that the Eleventh Amendment could be asserted to preclude relief against an individual defendant where the "real" defendant affected by the order was a State. 117 U.S. at 67. See also *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). It is this latter doctrine with which this case is concerned.

[61]In *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 309-15 (1973) Justice Brennan, dissenting, expressed the view that *Hans* was wrongly decided, and that the Eleventh Amendment should not be applied to suits against state by its own citizens. Although we believe that Justice Brennan's analysis was correct, that issue need not be reopened in order to resolve this case.

The fact that an order against a state official directs the official to use or disburse state funds within his or her control does not, by itself, bring the order within the prohibition of the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123 (1908), held that the Eleventh Amendment did not preclude the federal courts from directing state officials to conform their conduct to the requirement of the Fourteenth Amendment. In [illegible]*m v. Richardson*, 403 U.S. 365 (1971) and *Gol[illegible] v. Kelly*, 397 U.S. 254 (1970), this Court upheld orders directed to state welfare officials which clearly had substantial fiscal consequences for the state treasuries involved.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court explained that the validity of an order affecting the use of state funds turned on whether the order was "in practical effect indistinguishable . . . from an award of damages against the State," 415 U.S. at 668, or was merely "ancillary" to an order directing state officials to conform their present and future conduct to the requirement of the federal Constitution and laws. In *Edelman* this rule was applied to preclude the retrospective award of welfare payments which had been unlawfully delayed or withheld; the Court emphasized that such an award, however labeled, was indistinguishable from damages since "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." 415 U.S. at 668. Three years later in *Milliken v. Bradley*, 53 L.Ed.2d 745 (1977), this Court sustained an order directing Michigan officials to pay over $5 million in state funds to the Detroit School Board for the operation of certain programs established to remedy

past racial discrimination. The order was deemed ancillary to and a necessary concomitant of the district court injunction establishing those remedial programs.

Although "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night," *Edelman v. Jordan*, 415 U.S. at 667, the application of that distinction in this case is largely resolved by this Court's decision in *Fairmont Creamery v. State of Minnesota*, 275 U.S. 70 (1927). In that case, arising out of a state court prosecution of the Fairmont Creamery Company, this Court overturned the Company's conviction and awarded it costs. Subsequently the state filed a motion to retax costs on the ground that such a monetary award violated the sovereignty and immunity of the state. This Court unanimously upheld its power to make such awards of costs against a state as "within the inherent authority of the court in the orderly administration of justice as between all parties litigant." 275 U.S. at 74. The Court noted that the exercise of this authority was particularly appropriate and important where costs were awarded because the action was "a 'litigious case,' so-called," i.e. because the defendant had been unduly intransigent. *Id.*

As this Court noted in *Fairmont Creamery*, 275 U.S. at 77, the federal courts have traditionally awarded costs against a state, directly or through its officials, when the state becomes involved in litigation in a federal court in its own name or on behalf of its officials. Since the Judiciary Act of 1789[62] the federal

[62]1 Stat. 73, 93; *Henkel v. Chicago, etc., R.R.*, 284 U.S. 444 (1932).

courts have been expressly empowered to award costs. Provisions authorizing, and at times requiring, the award of costs and expenses are to be found throughout the Federal Rules of Civil Procedure,[63] the Federal Rules of Criminal Procedure,[64] the Federal Rules of Appellate Procedure,[65] the Rules of the Supreme Court,[66] and the United States Code.[67] These rules and statutes are literally applicable to all federal litigation, regardless of the identity of the parties, and have been uniformly applied even where the party liable for costs is a state or a state official. The Clerk of this Court taxes costs against a losing party without regard to the official status of that party. Costs are routinely awarded by this Court against (a) state agencies which are the defendants in federal civil actions for injunctive relief, (b) state officials who are the defendants in federal civil actions for injunctive relief, (c) state officials who are the defendants in federal habeas corpus actions, (d) state agencies which are the defendants in civil actions originating in state court, and (e) states in criminal prosecutions originating in state courts. A list of the cases in which such awards were made in October Terms 1970-76 is set out in the Appendix to this brief.

[63]Federal Rules of Civil Procedure, Rules 30(g), 37(a)(4), 41(d), 43(f), 54, 55(b)(1), 56(g), 65(c), 68.

[64]Federal Rules of Criminal Procedure, Rule 38(a)(3).

[65]Federal Rules of Appellate Procedure, Rules 7, 38, 39.

[66]Rules of the Supreme Court, Rules 14, 18, 36(3), 57, 60.

[67]See e.g., 28 U.S.C. §§1331, 1332, 1446, 1911-29, 2101(f), 2103.

That awards of costs are not subject to the Eleventh Amendment is consistent with the analysis in *Edelman*. The amount of costs, unlike damages, are not measured by the forseeable amount of harm caused by the defendant's violation of its legal responsibilities. Costs are only ancillary to any relief which may be prayed for in a complaint, and are not considered in assessing whether a case presents the $10,000 in controversy required by 28 U.S.C. §1331. If an action were won by default, or settlement, immediately after filing, there would be virtually no costs incurred. The ultimate award of costs in an injunctive action is, like the expenses incurred by the state's own counsel, an ancillary fiscal aspect of the conduct of litigation for prospective relief.

Petitioners in this case do not appear to deny that, as a general matter, the federal courts may award costs against states and state officials. Such awards are the normal incident of a successful action for declaratory or injunctive relief, and their "ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young*." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Were this Court to held such awards impermissible under the Eleventh Amendment, it would be required to rule unconstitutional insofar as they apply to state officials, every federal court rule and every provision of the United States Code authorizing awards of costs.

Petitioners maintain, however, that counsel fees cannot be included among the awardable costs, and that such fees are really a form of damages. We note at the outset that if petitioners' contention is sustained, then the award of counsel fees in this case must be paid by

Arkansas as a matter of state law. Arkansas Act 543 of 1977, which became law on March 18, 1977 provides in pertinent part that the State "shall pay actual damages adjudged by a state or federal court . . . against officers or employees of the State of Arkansas . . . based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties." Whatever the decision of this Court, the result in this case will remain the same. If the Court concludes counsel fees are awardable as costs, it will sustain the District Court order directing the fee be paid from state funds; if the Court concludes that counsel fees are "really" damages, it may overturn the requirement that the fee be paid from state funds, but the state will then pay it voluntarily in place of Mr. Hutto pursuant to Act 543.

There is, we believe, no basis for distinguishing counsel fees from other items of costs, such as transcripts, printing expenses, filing or docketing fees, or the expenses of witnesses, experts or interpreters. Awards of counsel fees, where proper, have long been regarded as a part of costs. The earliest authority for such awards in England was contained in a statute adopted in 1278 providing for taxation of "costs of his writ purchased."[68] The first congressional enactments regulating the award of counsel fees treated them as an item of taxable costs. 1 Stat. 93, 332; 10 Stat. 161 (1853); see 28 U.S.C. §1923(a). In recent years

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[68]Statute of Gloucester, 1278, 6 Edw. 1, c. 1; *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, n. 7 (1967).

Congress has adopted more than a score of statutes authorizing awards of attorneys' fees; in virtually every case that award was made an item to be included as part of the taxable costs.[69] In England costs have

[69]See e.g., 5 U.S.C. §552(a)2E (court may assess "attorneys' fees and other litigation costs"); 7 U.S.C. §210(f) (successful petitioner to be allowed "a reasonable attorney's fee to be taxed and collected as part of the costs of the suit"); 7 U.S.C. §499g(b) (successful petitioner to be allowed "a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit"); 15 U.S.C. §15 (plaintiff in antitrust action to recover "the cost of suit, including a reasonable attorney's fee"); 15 U.S.C. §72 (person injured by illegal importation to recover "the cost of the suit including a reasonable attorney's fee"); 15 U.S.C. §77k(e) (court may award to prevailing party "the costs of such suit, including reasonable attorney's fee"); 15 U.S.C. §78i(e) (court in securities case may "assess reasonable costs, including reasonable attorneys' fees"); 15 U.S.C. §78r(a) (court may "assess reasonable costs including reasonable attorneys' fees"); 17 U.S.C. §116 (court in patent action may award "a reasonable attorney's fee as part of the costs"); 18 U.S.C. §1964(c) (person injured by racketeering may sue and recover "the cost of the suit, including a reasonable attorney's fee"); 20 U.S.C. §1617 (court in school desegregation case may allow "a reasonable attorney's fee as part of the costs"); 33 U.S.C. §1365(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 33 U.S.C. §141(g)(4) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. §1857h-2(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. §2000a-3(b) (court in public accommodations case may allow "a reasonable attorney's fee as part of the costs"); 42 U.S.C. §2000e-5(k) (court in employment discrimination case may allow "a reasonable attorney's fee as part of the costs"); 42 U.S.C. §4911(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 45 U.S.C. §153(p), (court in Railway Labor Act case must allow prevailing

(continued)

traditionally included counsel fees; American practice diverged from this rule in early 19th century when Congress and the state legislatures adopted statutes severely limiting the amount of fees ordinarily includable as part of costs.[70] Since 28 U.S.C. §1923 authorizes but so limits in amount the award of counsel fees *as costs*, this Court in Alyeska Pipeline *Service v. Wilderness Society*, 421 U.S. 240 (1975), concluded the statute precluded an open ended power to award fees as a matter of equitable discretion. In *Flanders v. Tweed*, 15 Wall (82 U.S.) 450 (1873), the Court held that a jury could not award an fee in excess of that permitted by §1983 by denoting the additional counsel fees as damages rather than costs. 15 Wall at 452-53. See also, *Trustees v. Greenough*, 105 U.S. 527 (1882).

(footnote continued from preceding page)
employees "a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit"); 46 U.S.C. §1227 (successful plaintiff to recover "the cost of suit, including a reasonable attorney's fee"); 47 U.S.C. §206 (court to award "reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs in the case"); 49 U.S.C. §8 (court to award "reasonable counsel or attorney's fees" which "shall be taxed and collected as part of the costs of the case"); 49 U.S.C. §16(2) (court to award "reasonable attorney's fee, to be taxed and collected as part of the costs of the suit"); 49 U.S.C. §908(b) (court to award "a reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs in the case").

[70]Mr. Cormick on Damages, §60 (1935); Goodhart, Costs, 38 Yale Law Journal 849, 873 (1929). Professor Goodhart suggests the statutory allowances for fees may have been a reasonable approximation of actual fees when these statutes were first enacted, but were rendered nominal by the decades of inflation which followed. *Id.*

Counsel fees differ from other items of costs only in that, because of the American Rule, 28 U.S.C. §1923, and the variety of statutes noted at n.69, whether counsel fees can be taxed varies considerably from case to case, whereas docketing fees and transcripts are ordinarily taxable costs in all cases. The characteristics of other items of costs which render them ancillary under the standard of *Edelman* are also true of counsel fees. The amount of those fees are not measured by some past injury, they are not the gravamen of the action, and they will not, to a significant degree, be incurred or awardable if the action is resolved immediately after it is commenced. Frequently the fiscal impact of a counsel fee award will be minor in comparison with that of the injunctive relief which is the primary focus of the action. In the instant case, for example, the litigation resulted in the construction of a $546,000 building at Cummins, the cost of which was 27 times greater than the fee awarded. In light of these considerations the District Court correctly concluded that the Eleventh Amendment does not affect awards of counsel fees.

Respondents further maintain that the adoption of the Fourteenth Amendment worked a *pro tanto* repeal of the Eleventh Amendment, and that the Eleventh Amendment thus has no application in a Fourteenth Amendment case such as this. This Court noted the existence of this question but did not decide it in *Milliken v. Bradley*, 53 L.Ed.2d 745, 762, n.23 (1977); see also *Edelman v. Jordan*, 415 U.S. 651, 694, n.2 (1974) (Marshall, J., dissenting). Respondents concur in the views as to the impact of the Fourteenth Amendment are set out in the Brief Amicus Curiae of

the N.A.A.C.P. Legal Defense and Educational Fund, Inc. in *Edelman v. Jordan*, No. 72-1410. If the Court concludes that the Eleventh Amendment does not apply to awards of counsel fees it will not be necessary to decide to what extent that Amendment was modified by the subsequent enactment of the Fourteenth Amendment.

B. The Civil Rights Attorney's Fees Awards Act of 1976 Authorized Awards of Counsel Fees Against States In Actions Under 42 U.S.C. §1983

The Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-449, now codified in 42 U.S.C. §1988, was enacted in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Prior to *Alyeska* a number of lower courts had concluded that counsel fees could be awarded to prevailing plaintiffs who, acting as "private attorneys general", had vindicated important public policies; this private attorney general rule was applied with particular frequency in civil rights cases. 421 U.S. at 270, n.46. In *Alyeska* the Court held that the decision to award counsel fees under this rationale was "a policy matter that Congress has reserved for itself". Noting that "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees in some, but not others", 421 U.S. at 264, the majority held that counsel fees should only be allowed to private attorneys general under statutes which Congress had selected for such awards. In *Runyon v. McCrary*, 427 U.S. 160 (1976)

decided prior to the passage of P.L. 94-449 the Court ruled that 42 U.S.C. §1988 as then written did not provide such congressional authorization for awards of counsel fees in actions brought under 42 U.S.C. §1983. 427 U.S. at 182-86.

Within a few months of *Alyeska* numerous proposals was introduced in Congress to provide for civil rights cases the express congressional mandate for awards of counsel fees required by that decision.[71] Acting with unusual dispatch Congress completed hearings within that year,[72] The Senate and the Senate and House Judiciary Committees reported out similar bills in June and September of 1976.[73] Both reports emphasized that the basic purpose of the legislation was "to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court decision in *Alyeska*"[74] and to revive the practice sanctioned by numerous lower courts, but disapproved by footnote 46 of the *Alyeska* opinion, of awarding fees to private attorneys general in civil rights cases.[75] After debates emphasizing

[71]H.R. 7826, 7828, 7968, 7969, 8220, 8221, 8821, 8742, 8743, 9552, 94th Cong., 1st Sess.

[72]Hearings on the Awarding of Attorneys' Fees Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, 94th Cong., 1st Sess. (1975). The Senate which had held extensive hearings on the problem of counsel fees prior to *Alyeska*, did not hold additional hearings. Hearings on Legal Fees Before one Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee, 93rd Cong., 1st Sess. (1973).

[73]S. Rep. No. 94-1011; H.R. Rep. No. 94-1558.

[74]S. Rep. No. 94-1011, p. 1.

[75]H.R. Rep. No. 94-1558, p. 2.

Congress' intent to supply the express authorization of fees required by *Alyeska*, the Senate ended a filibuster, both houses approved the bill, and it was signed into law on October 19, 1976.[76]

[76]Representative Drinan, the House sponsor, explained:

> "The Civil Rights Attorney's Fees Award Act of 1976, S. 2278 (H.R. 15460) is intended to restore to the courts the authority to award reasonable counsel fees to the prevailing party in cases initiated under certain civil rights acts. The legislation is necessitated by the decision of the Supreme Court in Alyeska Pipeline Service Corp. against Wilderness Society, 421 U.S. 240 (1975)."

122 Cong. Rec. H12159 (daily ed. October 1, 1976); see also *id*, pp. H12150 (remarks of Rep. Anderson), H12154 (remarks of Rep. Railsback), H12155 (remarks of Rep. Seiberling), H12181 (remarks of Rep. Railsback), H12162-63 (remarks of Rep. Kastenmeier), H12163 (remarks of Rep. Fish), H12164 (remarks of Rep. Holtzman), (remarks of Rep. Seiberling). Senator Kennedy, the Senate manager of the bill, stated:

> "[t]he Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights Acts. This bill would close a series of loopholes in our civil rights laws created by the Supreme Court's Alyeska decision last year, and would reestablish a uniformity in the remedies available under Federal laws guaranteeing civil and constitutional rights."

122 Cong. Rec. S.16252 (daily ed., September 21, 1976). Senator Tunney, the Senate sponsor, noted that the bill

> "When enacted, will close a loophole in our present civil rights enforcement laws.
>
> In *Alyeska Pipeline Service Corp. v. Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court expressly stated that the lower Federal courts had no inherent equity power to award attorney's fees in civil rights cases absent statutory direction. This bill creates the necessary authorization and is addressed to the key questions raised in the opinion."

122 Cong. Rec. S.16491 (daily ed., September 23, 1976); see also *id.* at 51651 (remarks of Senator Mathias) (daily ed., September 21, 1976), S.16431 (remarks of Senator Hathaway (daily ed., September 23, 1976).

Public Law 94-559 provides:

> "In any action of proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§1681, et seq.] or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or changing a violation of, a provision of the United States Internal Revenue Code [26 U.S.C. §§ et seq.], or Title VI of the Civil Rights Act of 1964 [42 U.S.C. §§2000d et seq.], the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The statute expressly modifies the remedies available in a §1983 action, thus providing the congressional authorization for private attorney general awards required by *Alyeska* and found missing by *Runyon*.

While authorizing an award of counsel fees in favor of "the prevailing party," Public Law 94-559 does not specify against whom this or other awards of costs are to be made. Ordinarily costs, like other relief, are awarded against the named defendant in a civil action. In addition, a non-party who has an interest in the outcome of litigation and who fully participates therein is normally deemed liable to judgment just as if it were a formal party. "(O)ne who prosecutes or defends a suit in the name of another, to establish and protect his own rights, or who assists in the prosectuion or defense of an action in aid of some interest of his own, and who does so openly, to the knowledge of the opposing party, is as much bound by judgment, . . . as he would be if he had been a party to the record." *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87

(1910).[77] A state or other entity may elect to stand aloof from litigation against an official and to thus seek to preserve intact any immunity it may enjoy, but if it chooses to join in the litigation and to seek to win and enjoy the benefits of a successful defense, it must run the same risks, including the possibility of an award of costs, that must be run by an ordinary party should that defense fail. Compare 2A Moore's Federal Practice ¶12.13.

The rule in *Souffront* is of obvious importance in litigation under 42 U.S.C. §1983. Such actions must usually be brought against a city or state official rather than against the city or state itself. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961).[78] In most of these cases the city or state

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[77]*Grimes. v. Chrysler Motors Corp.*, ____ F.2d ____ (2d Cir. 1977); *Dicks Press Guard Mfg. Co. v. Bowen*, 229 F. 193, 196 (N.D. N.Y.), aff'd, 229 F. 575 (2d Cir.) *cert. denied*, 241 U.S. 671 (1915); *Ocean Accident & Guarantee Corp. v. Felgemaker*, 143 F.2d 950, 952 (6th Cir. 1944); *Eagle Mfg. Co. v. Miller*, 41 F. 351, 357 (S.D. Iowa 1890); *Maynard v. Wooley*, ____ F. Supp. ____ (D.N. H. 1977).

[78]To what extent city or state agencies are immune from suits remains an open question, as does the extent to which, notwithstanding *Kenosha* and *Monroe*, a defendant official in a section 1983 action can be directed to expend government funds. See *Monnell v. Department of Social Services*, No. 75-1914; *Milliken v. Bradley*, 53 L.Ed.2d 745 (1977). The instant proceeding resulted from a consolidation of a substantial number of prisoner suits filed in the District of Arkansas from 1969 to 1972. In two of these actions the Arkansas Department of Corrections was a named defendant. *Pittman v. Arkansas Department of Corrections*, PB-72-C-15, *Russell v. Department of Corrections*, PB-72-C-155.

assumes control of the defense of the litigation, either to vindicate the validity of the challenged practice or to protect the defendant officials from monetary awards. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). When that occurs it is the city or state, rather than the individual defendants, whose unsuccessful defense of the action requires the plaintiff to incur attorneys' fees and costs. In the instant case the Attorney General of Arkansas assumed control of the litigation from the outset and conducted the lengthy and at times intransigent defense.[79] Under such circumstances, as here, any award of costs would properly be made payable by the city or state rather than named defendants. Public Law 94-559 includes counsel fees among the costs which may be awarded against the named defendant or interceding interested government, as justice may require.

The legislative history of Public Law 94-559 unambiguously demonstrates that Congress intended that the statute be applied in this manner, and that awards in cases such as this be paid out of state funds. The Senate Report stated:

> "As with cases brought under 20 U.S.C. §1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies

[79] 2A Ark. Stat. Anno. §12-712 provides:

> "The Attorney General shall maintain and defend the interests of the State in matters before the United States Supreme Court, and all other Federal courts, and shall be the legal representative of all State officers, boards and commissioners, in all litigation where the interests of the State are involved."

> or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)."

See Rep. No. 94-1011, p. 5. Similarly the House Report noted that:

> "governmental officials are frequently the defendants in cases brought under the statutes covered by [the bill]. See, *e.g.*, *Brown v. Board of Education* . . . Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. . . . The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against government officials or entities.

H.R. Rep. No. 943-1558, p. 7.

In the Senate, Senator Helms offered an amendment to the bar awards of counsel fees against "any territory or possession thereof, or any State of the United States or any political subdivision thereof including special purpose units of general local governments."[80] Senator Helms urged that the amendment was necessary to "afford protection to financially pressed State and local

[80] 122 Cong. Rec. S. 16433 (daily ed. Sept. 22, 1976).

governments."[81] The Senate rejected the proposal by a vote of 59 to 28.[82]

Congress was aware that the award of counsel fees against states might raise a question under the Eleventh Amendment. The Administrative Office of the United States Courts and two other organizations expressly brought the issue to the attention of the House Judiciary Committee.[83] The House Report, issued two months after the decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), expressly invoked that decision as upholding the power of Congress to subject a state to monetary liability despite the Eleventh Amendment.[84] The Senate Report, written before *Fitzpatrick*[85] as-

[81]*Id.*, at S. 16432, "This legislation provides that State and local governments and their officials can be defendants in cases involving these statutes and that attorneys' fees will be collected either directly from the official in his official capacity, from funds of his agency or under his control, or from the State of local government. Presently this legislation potentially places a tremendous burden upon State and local governments. In other public interest law suits where the legal fees have been contested they have ranged from $200,000 to $800,000. Certainly, it is unwise to provide that liability in these amounts be assumed by already financially hard-pressed State and local governments."

[82]*Id.*, S. 16434.

[83]Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, 94th Cong., 1st Sess., pp. 36, 41, 268 (1975).

[84]*Id.*, p. 8, n. 14. "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpatrick v. Bitzer.*"

[85]The report was filed on June 29, 1976, the day after the decision in *Fitzpatrick*.

serted that the award of such fees were "in accordance with Congress' powers under, *inter alia*, the Fourteenth Amendment, Section 5," insisted such fees were "ancillary and incident to securing compliance with"[86] sections 1983, etc., noted that counsel fees were properly regarded as "costs", and cited the decision in *Fairmont Creamery* exempting counsel fees from the scope of the Eleventh Amendment.[87] In the House debates Congressman Drinan, the bill's sponsor, reiterated Congress' authority to impose liability on a state notwithstanding the Eleventh Amendment.[88]

Awards of fees from government funds are manifestly necessary to carry out the fundamental purposes of the statute. As the House Report explained:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many

[86]This was clearly an attempt to invoke the standard announced by the Court in *Edelman v. Jordan*, discussed *supra*.

[87]S. Rep. No. 94-1011, p. 5.

[88]"The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th Amendment. That amendment limits the power of the Federal court to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick and Bitzer. Since this bill is enacted pursuant to the power of Congress under section 2 of the 13th amendment and section 5 of the 14th amendment, any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants." 121 Cong. Rec. H12160-61 (daily ed., October 1, 1976).

> instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolves according to law.

H.R. Rep. No. 94-1558, p. 1.[89] In any §1983 case involving protracted litigation the amount of the fee to which a prevailing plaintiff would be entitled could easily exceed the personal funds of the individual defendants. If the resources of the city or state conducting the litigation could not be reached the plaintiff could not receive the full redress contemplated by Congress. Where, as commonly occurs, the actual conduct of the litigation is controlled by the city or state, immunity from an award of fees would encourage government counsel to act in a dilatory manner unfair to plaintiff and defendant alike. Under other counsel

[89]See also S. Rep. No. 94-1011, pp. 2, 6; 122 Cong. Rec. S16251 (remarks of Senators Scott and Mathias), S16242 (remarks of Senator Kennedy) (daily ed. September 21, 1976). S1643 (remarks of Senator Hathaway) (daily ed. September 23, 1976), S17051 (remarks of Senators Kennedy and Tunney), S17052 (remarks of Senators Kennedy and Abourezk) (daily ed. September 29, 1976); H12155 (remarks of Rep. Sieberling), H12163 (remarks of Rep. Fish), H12164 (remarks of Rep. Holtzman) (daily ed. October 1, 1976).

fee provisions, such as the Civil Rights Act of 1964[90] the Emergency School Aid Act of 1972,[91] awards against cities and states are clearly authorized.[92] The legislative history of Public Law 94-559 makes plain that Congress intended that that statute "would achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights,"[93] and specifically referred to Civil Rights[94] and Emergency School Aid Acts[95] as establishing the standards it wished to apply to litigation under 42 U.S.C. §1983. The intended uniformity clearly requires that counsel fees be available against cities and states in §1983 cases just as it is in Title VII and school desegregation cases.

The power of Congress to impose monetary liability on a state in connection with a violation of the

[90]See, e.g., 42 U.S.C. §2000e-5.

[91]20 U.S.C. §1617.

[92]*Fitzpatrick v. Bitzer*, 427 U.S. 445 (1977); *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974).

[93]H.R. Rep. No. 94-1558, p. 1; see also *id.*, p. 8; S. Rep. No. 94-1011, pp. 1, 4; 122 Cong. Rec. S16252 (remarks of Senator Kennedy) (daily ed. September 21, 1976); H12151 (remarks of Rep. Anderson), H12159 (remarks of Rep. Drinan), H12163 (remarks of Rep. Kastenmeier) (daily ed. October 1, 1976).

[94]S. Rep. No. 94-1011, pp. 4, 5; H.R. Rep. No. 94-1558, p. 6; 122 Cong. Rec. S16251 (remarks of Senator Scott) (daily ed. September 21, 1976), S16430-31 (remarks of Senator Hathaway) (daily ed. September 23, 1976), H12150 (remarks of Rep. Anderson), H12159 (remarks of Rep. Drinan), H12163 (remarks of Rep. Kastenmeier), H12165 (remarks of Rep. Seiberling) (daily ed. October 1, 1976).

[95]S. Rep. No. 94-1011; p. 4; H.R. Rep. No. 94-1558, pp. 1, 3, 6.

Fourteenth Amendment is not disputed. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court rejected a challenge to the power of Congress to subject states to awards of backpay and counsel fees under Title VII of the 1964 Civil Rights Act. The Court concluded that "[w]hen Congress acts pursuant to §5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is appropriate legislation for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." 427 U.S. at 456. Provisions for awards of counsel fees in Fourteenth Amendment litigation to redress cruel and unusual[96] prison conditions is clearly an appropriate method of vindicating that constitutional prohibition. See *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

Although the intent and authority of Congress is beyond dispute, petitioners maintain that the Congress failed to frame the statute in a manner sufficient to achieve its purpose. Were this contention accepted, it would not only frustrate the congressional purpose, but would render counsel fee awards in section 1983 cases, which are awarded without regard to the defendants'

[96]The Eighth Amendment prohibition against cruel and unusual punishment is incorporated in the due process clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

good faith, payable exclusively from the personal resources of the defendant official. That individual liability would exist even though the official had no meaningful control of the litigation, and would apply regardless of whether the defendant official were a governor,[97] legislator,[98] judge,[99] police officer,[100] school official,[101] or prosecutor.[102] In the instant case petitioners' argument, if successful would shift the liability for the counsel fee from the funds of the Board of Corrections to the personal funds of Mr. Hutto.

Petitioners appear to urge that where Congress wishes to exercise its authority under section 5 of the Fourteenth Amendment to impose liability on a state it must do so in some special "express statutory language."[103] Precisely what language petitioners claim must be used is not clear. The decisions of this Court support no such technical requirement. In *Employees v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), the "literal language" of the statute rendered state agencies liable to suit in federal court. 411 U.S. at 283. The Court nonetheless concluded there was no such jurisdiction because it could find "not a word in the history of the 1966 amendments to indicate a

[97]See *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

[98]See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

[99]See *Pierson v. Ray*, 386 U.S. 547 (1967).

[100]See *Pierson v. Ray*, 386 U.S. at 555-57.

[101]See Wood v. Strickland, 420 U.S. 308 (1975).

[102]Imbler v. Pachtman, 424 U.S. 409 (1976).

[103]Brief for Petitioners, pp. 7-9.

purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts." 411 U.S. at 285. (Emphasis added) Similarly, in *Edelman v. Jordan*, 415 U.S. 651 (1974) the Court concluded that section 1983 did not authorize monetary awards from state funds, not because of the language of the statute, but because there was no evidence that section 1983 "was *intended* to create a waiver of a State's Eleventh Amendment immunity merely because of action could be brought against state officers, rather than against the State itself." 415 U.S. at 676-77. (Emphasis added) The construction of statutes touching on a State's Eleventh Amendment immunity differs from that of other statutes, if at all, only to the extent that, where the consequence of a loss of immunity would be unusually harsh, the Court will not infer from a silent legislative history an intent to so affect "the delicate federal-state relationship."[104] *Employees*, 411 U.S. at 286. In the instant case that history is unambiguous, and the resulting liability for counsel fees is an ordinary

[104]This is well exemplified by the circumstances of *Employees* and *Fitzpatrick*. In both cases the statute involved merely repealed a prior exclusion of state agencies from an existing regulatory scheme. In *Employees* the legislative history was silent, and federal jurisdiction would have subjected the states to an unusual provision for double damages; the Court declined on the record to infer an intent to create federal jurisdiction. In *Fitzpatrick* coverage by Title VII entailed only liability for injunctive relief, backpay, and counsel fees; the Court in summarily construing the statute to authorize suit in federal court did not bother to discuss the statute's legislative history.

incident of litigation, not the unique provision for double damages at issues in *Employees*.

Petitioners further contend that Public Law 94-559 should not be applied to litigation which was commenced prior to October 19, 1976 though still pending on that date. Brief for Petitioners, pp. 9-11. Assuming *arguendo* that this question is "fairly comprised" within the question presented, we believe it is manifestly unsound. *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), presents a situation indistinguishable from the instant case. There, as here, a new statute expressly authorizing counsel fees was enacted long after the commencement of the action but while the propriety of such an award was still an issue pending before the court of appeals. This Court upheld the award of fees under the newly adopted statute in light of "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. In *Bradley* the legislative history was silent; in the instant case Congress clearly indicated its intent that the statute be applied to pending cases.[105]

[105]H.R. Rep. No. 94-1558, P. 4, n. 6. "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974)." The House manager, Congressman Drinan, explained "[T]his bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In Bradley versus Richmond School Board, the Supreme Court expressly applied that

(continued)

Petitioners suggest that the application of Public Law 94-559 to this case would result in "manifest injustice." Although they contend that an award of $20,000 will have "tremendous" effect on "the budgetary and fiscal policy of the State of Arkansas," this sum is clearly an insignificant portion of the State's annual budget of $1 billion, and is also insignificant in comparison with the funds required to comply with undisputed portions of the injunctive relief. Petitioners do not suggest that they would have acted any differently had they been aware of their possible liability for counsel fees; nor would such a contention be plausible in light of the facts of this case, since the private attorney general rule was applied by the Eighth Circuit prior to *Alyeska*,[106]

(footnote continued from preceding page)
long-standing rule to an attorney fee provision, including the award of fees for services rendered prior to the effective date of the statute." 122 Cong. Rec. H12160 (daily ed. October 1, 1976); see also *id.*, pp. H12155 (remarks of Rep. Anderson). A motion by Representative Ashbrook to recommit the bill with instructions to amend it to apply "to cases filed only after the effective date of this act" was decisively rejected. *Id.*, p. H12166. Senator Abourezk, one of the chief proponents of the bill, explained, "The Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits presently pending in the Federal courts. The application of this Act to pending cases is in conformity with the unanimous decision of the Supreme Court in *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974)."

This application is necessary to fill the gap created by the *Alyeska* decision and thus avoid the inequitable situation of an award of attorneys' fees turning on the date the litigation was commenced." 122 Cong. Rec. S17052 (daily ed. September 29, 1976).

[106]Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974);

and the district court had previously made another fee award of $8,000 payable from the funds of the Department. See *Bradley v. Richmond School Board*, 416 U.S. at 720-22. Here, as in *Bradley*, the litigation assisted the defendants in meeting their constitutional responsibilities. 416 U.S. at 717-20. This case presents no exceptional circumstances which would warrant disregarding the plain intent of Congress, and the rule in *Bradley*, that this newly enacted legislation be applied to pending cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Judgment of the courts below should be affirmed.

Respectfully submitted,

PHILIP E. KAPLAN
1650 Tower Building
Little Rock, Arkansas 72201

JACK HOLT, JR.
1100 North University
Evergreen Place
Little Rock, Arkansas

PHILIP E. McMATH
McMath, Leatherman & Woods,
711 West Third Street
Little Rock, Arkansas 72201

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
STANLEY BASS
ERIC SCHNAPPER
LYNN WALKER
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents

APPENDIX

This Appendix sets forth cases in which the Clerk of the Supreme Court has awarded costs against a state, or a state official, during October Terms, 1970-76. With regard to awards against state officials, the list is limited to actions for injunctive relief against the defendant in his official capacity, in which the action was defended by the state and where, as a consequence, there was no suggestion that the costs would be paid by the defendant personally. Costs have also been awarded in damage actions against state officials, e.g. Scheuer v. Rhodes, No. 72-914; these cases, however, are not included, since, although the costs are in fact usually paid by the state, the defendant officials were personally liable.

(a) Civil actions for injunctive relief against states or state agencies, originating in federal court, in which costs were awarded to plaintiffs:

Alamo Cattle Co. v. Arizona, No. 74-125;
Christian v. New York Department of Labor, No. 72-5704;
Papish v. Board of Curators of University of Mississippi, No. 72-794.

(b) Civil actions for injunctive relief against state officials, originating in federal court, in which costs were awarded to the plaintiff:

Connor v. Waller, No. 74-1509 (Defendant was the Governor of Mississippi);

Meek v. Pittinger, No. 73-1765 (Defendants were the Secretary of State and Treasurer of Pennsylvania);

Chapman v. Meier, No. 73-1406 (Defendant was the Secretary of State of North Dakota);

Hagans v. Levine, No. 72-6476 (Defendant was the Commissioner of the New York State Department of Social Services);

Communist Party of Arizona v. Whitcomb, No. 72-1040 (Defendant was the Secretary of State of Indiana and the members of the Indiana State Election Board);

Committee for Public Education v. Nyquist, No. 72-694 (Defendant was the New York Commissioner of Education);

Norwood v. Harrison, No. 72-77 (Defendants were the members of the Mississippi State Textbook Purchasing Board);

Healy v. James, No. 71452 (Defendant was the President of Central Connecticut State College);

Fuentes v. Shevin, No. 70-5039 (Defendant was the Attorney General of Florida);

Taylor v. McKeithen, No. 71-784 (Defendant was the Governor of Louisiana);

Townsend v. Swank, No. 70-5021 (Defendant was the Director of the Illinois Department of Public Aid);

Great Atlantic and Pacific Tea Co. v. Cottrell, No. 74-1148 (Defendant was the Health Officer of Mississippi);

Yovakim v. Miller, No. 73-6935 (Defendant was the Director of the Illinois Department of Children and Family Services);

Planned Parenthood of Central Missouri v. Danforth, Nos. 74-1151 and 74-1419 (Defendant was the Attorney General of Missouri);

Craig v. Boren, No. 75-628 (Defendants included the Governor of Oklahoma).

(c) Civil Actions for injunctive or monetary relief, against a state or state official, originating in state court, in which costs were awarded to the plaintiff:

Austin v. New Hampshire, No. 73-2060;

Mescalero Apache Tribe v. Jones, No. 71-738;

McClanahan v. Arizona State Tax Commission, No. 71-834;

Evco v. Jones, No. 71-857;

Matz v. Arnet, No. 71-1182;

Bonnelli Cattle Corp. v. Arizona, No. 72-397;

Local 76 v. Wisconsin Employment Relations Commission, No. 75-185;

Boston Stock Exchange v. State Tax Commission, No. 75-1019.

(d) Habeas corpus actions against state officials, originating in federal court in which costs were awarded to the petitioner:

Francisco v. Gathright, No. 73-5768;

Robinson v. Neil, No. 71-6272;

Peters v. Kiff, No. 71-5078;

Loper v. Beto, No. 70-5388;

Humphrey v. Kady, No. 70-5004;

Morrissey v. Brewer, No. 71-5103.

(e) Criminal prosecutions arising in state court in which costs were awarded to the defendant:

Brown v. Illinois, No. 73-6650;

Faretta v. California, No. 5772;

Herring v. New York, No. 73-6587;

Bigelow v. Virginia, No. 73-1309;

Drepe v. Missouri, No. 73-6038;

Antoine v. Washington, No. 73-717;
Taylor v. Louisiana, No. 75-5744;
Jenkins v. Georgia, No. 73-557;
Spence v. Washington, No. 72-1690;
Codispoti v. Pennsylvania, No. 73-5615;
Davis v. Alaska, No. 72-5794;
Alexander v. Virginia, No. 71-1315;
Roaden v. Kentucky, No. 71-1134;
Chambers v. Mississippi, No. 71-5908;
Furman v. Georgia, No. 69-5003;
Jackson v. Georgia, No. 69-5030;
Branch v. Texas, No. 69-5031;
Turner v. Arkansas, No. 71-1309;
Brooks v. Tennessee, No. 71-5313;
Jackson v. Indiana, No. 70-5009;
Columbo v. New York, No. 71-352;
Smith v. Florida, No. 70-5055;
Rabe v. Washington, No. 71-247;
Alexander v. Louisiana, No. 70-5026;
Stanley v. Illinois, No. 70-5014;
Camp v. Arkansas, No. 70-353;
Santebello v. New York, No. 70-98;
McKinney v. Alabama, No. 74-532;
Doyle v. Ohio, Nos. 75-5014 and 75-5015;
Gardner v. Florida, No. 74-6593;
Roberts v. Louisiana, No. 76-5206;
Brown v. Ohio, No. 75-6933;
Hankerson v. North Carolina, No. 75-6568;
Coker v. Georgia, No. 75-5444.

No. 76-1660

In the Supreme Court of the United States

OCTOBER TERM, 1977

TERRELL DON HUTTO, ET AL., PETITIONERS

v.

ROBERT FINNEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
Solicitor General,
DREW S. DAYS, III,
Assistant Attorney General,
WALTER W. BARNETT,
DENNIS J. DIMSEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether the Civil Rights Attorney's Fees Awards Act of 1976 authorizes an award of attorney's fees to be paid from the funds of a state department of correction.

2. Whether the Civil Rights Attorney's Fees Awards Act applies to cases pending on the date of its enactment.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, provides as follows:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. 1979, 42 U.S.C. 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTEREST OF THE UNITED STATES

The Attorney General has responsibility for enforcement of a variety of federal civil rights laws, including those requiring nondiscrimination in voting (42 U.S.C. 1971 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c *et seq.*), federally assisted programs (42 U.S.C. 2000d *et seq.*), public employment (42 U.S.C. 2000e *et seq.*), and housing (42 U.S.C. 3601 *et seq.*). The private suit is an essential means of obtaining judicial enforcement of civil rights statutes. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209. Such suits will be encouraged if private plaintiffs suing state officials pursuant to 42 U.S.C. 1983 may be awarded attorney's fees as provided in the Civil Rights Attorney's Fees Awards Act. Accordingly, the United States has a substantial interest in the proper interpretation of that Act.

STATEMENT

This class action under 42 U.S.C. 1983 challenges as unconstitutional the conditions of confinement for inmates of penal institutions administered by the Arkansas State Department of Correction. Respondents are inmates confined in these institutions; peti-

tioners include the Correction Commissioner, the members of the Arkansas State Board of Correction, and the Superintendents of the Cummins Unit of the Department and the Tucker Intermediate Reformatory (Pet. App. 17).

The district court here held the Arkansas prison system unconstitutional in certain respects.[1] The court ruled, *inter alia,* that the conditions of confinement for inmates placed in indefinite punitive isolation constituted cruel and unusual punishment. The court ordered the upgrading of the conditions of those placed in punitive isolation and prohibited respondents from confining any inmate in punitive isolation for more than 30 days. The court awarded respondents certain litigation costs, including an attorney's fee of $20,000, to be paid from funds allocated to the Department of Correction. 410 F. Supp. 251 (Pet. App. 6–92).

On appeal, petitioners challenged the district court's rulings limiting the duration of sentences to punitive isolation and awarding respondents attorney's fees. The court of appeals affirmed, and awarded respondents an additional $2,500 in attorney's fees for services on the appeal. 548 F. 2d 740 (Pet. App. 1–6).

[1] It acted pursuant to the court of appeals' remand in *Finney* v. *Arkansas Board of Correction*, 505 F. 2d 194 (C.A. 8), affirming in part and reversing in part *Holt* v. *Hutto*, 363 F. Supp. 194 (E.D. Ark.). The earlier procedural history of this protracted litigation may be found in *Holt* v. *Sarver*, 300 F. Supp. 825 (E.D. Ark.), and *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark.), affirmed, 442 F. 2d 304 (C.A. 8).

Petitioners here contest both the 30-day limitation on the use of indefinite punitive isolation and the attorney's fees awards.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the "American Rule," litigants ordinarily pay their own attorney's fees in the absence of statutory or contractual provisions to the contrary. Acting pursuant to their inherent equitable powers, federal courts have recognized several exceptions to this rule. The "bad faith" exception allows a court to shift attorney's fees to a party found to have commenced an action or asserted a defense in bad faith, vexatiously, wantonly, or for oppressive reasons. *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 129; *Vaughn* v. *Atkinson,* 369 U.S. 527, 530–531. And under the "common benefit" exception, the cost of litigation is spread

[2] We have not had access to the record in this case in sufficient time to address the punitive isolation issue. On December 5, 1977, this Court granted petitioners' motion to dispense with the printing of an appendix. The record was not filed with the Court until December 12, 1977. In addition, we have been advised by counsel for respondents that testimony pertinent to the punitive isolation issue has not been transcribed. See Pet. App. 90 n. 14. If the entire record pertinent to this issue becomes available sufficiently in advance of oral argument, the United States may wish to file a supplemental brief that addresses this question. At this time, we take no position on the question whether the district court exceeded its remedial powers in placing a 30-day limit on the use of punitive isolation. We believe, however, that petitioners' separate challenges to the attorney's fees award—which present essentially legal questions—may be considered without the benefit of a review of the complete record. Accordingly, this brief will address those questions.

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among those who benefit from the lawsuit. *Hall* v. *Cole*, 412 U.S. 1, 5 n.7; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 393–394. Under a third exception—the "private attorney general" doctrine—federal courts had awarded attorney's fees to plaintiffs who were successful in suits to enforce the provisions of federal statutes. See, *e.g.*, *Souza* v. *Travisono*, 512 F. 2d 1137 (C.A. 1), vacated, 423 U.S. 809; *Cornist* v. *Richland Parish School Board*, 495 F. 2d 189 (C.A. 5); *Taylor* v. *Perini*, 503 F. 2d 899 (C.A 6), vacated, 421 US. 982; *Donohue* v. *Staunton*, 471 F. 2d 475 (C.A. 7), certiorari denied, 410 U.S. 955; *Fowler* v. *Schwarzwalder*, 498 F. 2d 143 (C.A. 8); *Brandenburger* v. *Thompson*, 494 F. 2d 885 (C.A. 9). The attorney's fees awards in such cases were made primarily on the theory that the bringing of the litigation had implemented a public policy embodied in the substantive statute at issue, and that, accordingly, the plaintiff had performed a public service in the capacity of a "private attorney general."

In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, the Court rejected the private attorney general exception to the American Rule, in the absence of statutory authorization. The Court reversed an award of attorney's fees to organizations that had instituted litigation to prevent issuance of permits by the Secretary of the Interior which were required for the construction of the trans-Alaska oil pipeline. Although the Court endorsed the "bad faith" and "common benefit" doctrines, 421 U.S. at 258–259,

it ruled that the courts' equitable powers would not support an award of attorney's fees to facilitate private enforcement of federal statutory rights. The Court stated that (421 U.S. at 269):

> [s]ince the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorney's fees beyond the limits of 28 U.S.C. § 1923 [permitting the taxing as costs of attorney's and proctor's docket fees and certain printing costs], those courts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.

Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94–559, 90 Stat. 2641, in response to this Court's decision in *Alyeska*.[2] The Act permits a federal court, in its discretion, to award reasonable attorney's fees to prevailing parties in suits to enforce the provisions of a number of civil rights statutes, including R. S. 1979 (42 U.S.C. 1983),

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[2] The Senate Judiciary Committee stated that the purpose of the bill was to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska* * * *." S. Rep. No. 94–1011, 94th Cong., 2d Sess. 1, 4 (1976). Accord, 121 Cong. Rec. S14975 (daily ed., August 1, 1975) (remarks of Senator Tunney).

pursuant to which this action was brought.' The Senate Report explains (S. Rep. No. 94–1011, *supra*, at 2) that the Act:

> is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. * * * All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

The court of appeals correctly ruled that the Act authorized the award of attorney's fees in this case, to be paid from the funds of a state agency. The Act specifically authorizes an award in cases—such as this one—brought under 42 U.S.C. 1983. Defendants in cases brought under Section 1983 typically are state officials acting under color of state law, whose legal defense ordinarily is provided by the State. Congress not only intended the Act to authorize the award of

[1] See, generally, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 Wash. L. L. Rev. 205–223 (1977).

attorney's fees in such cases, but also specifically anticipated that such awards would normally be paid from state funds. Since the Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, it abrogates any Eleventh Amendment immunity that the State might otherwise have enjoyed. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445. And, in any event, under *Edelman* v. *Jordan*, 415 U.S. 651, 668 the attorney's fees award has only an "ancillary effect" on the state treasury, and therefore under the rationale of *Ex parte Young*, 209 U.S. 123, falls outside the prohibitions of the Eleventh Amendment. Moreover, for the reasons discussed in the brief for the United States as *amicus curiae* in *Zurcher* v. *The Stanford Daily*, No. 76–1484, and *Bergna* v. *The Stanford Daily*, No. 76–1600, the fact that this action was commenced before the passage of the Act does not defeat the award in this case.

ARGUMENT

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 AUTHORIZES AN AWARD OF ATTORNEY'S FEES IN THIS CASE

The court of appeals correctly ruled that the Civil Rights Attorney's Fees Awards Act of 1976 authorized an award of attorneys' fees in favor of the respondents (Pet. App. 4–5).[1] The Act specifically authorizes an award of attorney's fees to "the prevailing party" in cases such as this brought under 42

[1] The district court awarded attorney's fees to respondents on the theory that the instant case is "markedly different in quality from *Alyeska* and also that it falls within the 'bad faith' exception to the American Rule recognized in *Alyeska*" (Pet. App. 86). Since

U.S.C. 1983.[6] Neither the fact that the fees are to be paid out of state funds nor the fact that they cover work performed in part before the passage of the Act affects the propriety of the award.

A. THE ELEVENTH AMENDMENT DOES NOT BAR AN AWARD OF ATTORNEY'S FEES TO BE PAID FROM STATE FUNDS PURSUANT TO THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT

1. As a Valid Exercise of Congressional Power Pursuant to Section Five of The Fourteenth Amendment, The Act Abrogates Any Eleventh Amendment Immunity The State Might Otherwise Have Enjoyed

In *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, the Court held that the Eleventh Amendment did not prohibit the award of attorney's fees to "be paid out of the state treasury" (*id.* at 451) to plaintiffs who were successful in an employment discrimination suit brought against state officials pursuant to Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended,

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the Civil Rights Attorney's Fees Awards Act of 1976 was enacted while the case was pending on appeal, the court of appeals found it unnecessary to pass on the bad faith justification for the award although it noted that "the record fully supports the finding of the district court" on that question (Pet. App. 5). The existence of the Act similarly makes it unnecessary for this Court to consider whether the award of attorney's fees was justified by petitioners' conduct (see *infra*, p. 21).

[6] Respondents are "the prevailing party" within the meaning of the Act. They have prevailed on most of the issues that were resolved during the period covered by the award, including issues that are not being contested in this Court. An award of counsel fees is appropriate under the Act even when the prevailing party "ultimately does not prevail on all issues." S. Rep. No. 94–1011, *Supra*, at 5; 34 Wash. L. L. Rev. at 218–219.

42 U.S.C. (and Supp. V) 2000e *et seq.*[7] As amended in 1972, Title VII specifically authorizes the award of backpay and attorney's fees in suits against state and local governments. This Court reasoned that the Eleventh Amendment and the principle of state sovereignty it embodies[8] are limited by the provisions of Section 5 of the Fourteenth Amendment, and that Congress, in authorizing backpay and attorney's fees awards against the states under Title VII, was acting pursuant to its Fourteenth Amendment enforcement authority.

The rationale of *Fitzpatrick* v. *Bitzer* is fully applicable here. Like Title VII, the Civil Rights Attorney's Fees Awards Act was enacted pursuant to

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[7] The Court distinguished *Edelman* v. *Jordan*, 415 U.S. 651, in which the Eleventh Amendment was held to bar a private federal action for retroactive damages for the wrongful denial of welfare benefits, on the ground that the statutes involved in *Edelman* did not show any congressional intent to deprive the states of their Eleventh Amendment immunity, and thus "were incapable of supporting the predicate for a claim of waiver on the part of the State." *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 452. This Court found a similar absence of congressional intention to limit state immunities in *Employees* v. *Missouri Public Health Dep't.*, 411 U.S. 279, upon which petitioners rely. In contrast, here, as in *Fitzpatrick* v. *Bitzer*, the congressional intent to limit that immunity is clear.

[8] Although the Amendment, quoted *supra* at p. 2, explicitly prohibits only suits against states in federal court brought by citizens of other states or by citizens or subjects of any foreign state, this Court has interpreted it as preserving the state's sovereign immunity, and thus precluding also unconsented actions brought by a citizen of the state being sued. *Edelman* v. *Jordan*, *supra; Employees* v. *Missouri Public Health Dept.*, *supra; Parden* v. *Terminal R. Co.*, 377 U.S. 184; *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47; *Hans* v. *Louisiana*, 134 U.S. 1.

Congress' powers under Section 5 of the Fourteenth Amendment (as well as its similar power to enforce the Thirteenth Amendment). See, *e.g.*, S. Rep. No. 94–1011, *supra*, at 5. Like the backpay and attorney's fees provisions of Title VII, then, the Attorney's Fees Awards Act limits the Eleventh Amendment principle of state sovereignty.[9]

That Congress intended to subject states and their agencies to the payment of attorney's fees in cases against their officials is clear from the legislative history of the Act. The Senate repeatedly tabled amendments that would have exempted state and local governments from the Act's requirements. 122 Cong. Rec. S16431–S16434 (daily ed., September 22, 1976); 122 Cong. Rec. S16567 (daily ed., September 24, 1976); 122 Cong. Rec. S16656, S16657 (daily ed., September 27, 1976). The Senate Report accompanying the Act provides (S. Rep. No. 94–1011, *supra*, at 5).

> As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972,

[9] The lower federal courts have generally agreed that the Act abrogates the states' Eleventh Amendment immunity. See *Gates* v. *Collier*, 559 F. 2d 241 (C.A. 5); *Bond* v. *Stanton*, 555 F. 2d 172 (C.A. 1); *Rainey* v. *Jackson State College*, 551 F. 2d 672 (C.A. 5); *La Raza Unida of Southern Alameda County* v. *Vople*, N.D. Cal., No. C–71–1166 RPF, decided September 29, 1977; *Southeast Legal Defense Group* v. *Adams*, 436 F. Supp. 891, 893–894 (D. Ore.); *Guajardo* v. *Estelle*, 432 F. Supp. 1373 (S.D. Tex.); *Gary W.* v. *State of Louisiana*, 429 F. Supp. 711 (E.D. La.); *Wade* v. *Mississippi Co-Op Extension Service*, 424 F. Supp. 1242 (N.D. Miss.). But see *Skehan* v. *Board of Trustees of Bloomsburg State College*, 436 F. Supp. 657, 666–667 (M.D. Pa.); *Shannon* v. *United States Department of Housing and Urban Development*, 433 F. Supp. 249 (E.D. Pa.).

> defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorney's fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party) [footnotes omitted].

The pertinent House Report, H.R. Rep. No. 94–1558, 94th Cong., 2d Sess. 7 (1976), provides that:

> [G]overnment officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460. See, *e.g.*, *Brown* v. *Board of Education*, [347 U.S. 483]; *Gautreaux* v. *Hills*, [sic] [425 U.S. 284]; *O'Connor* v. *Donaldson*, [422 U.S. 563]. Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. * * * The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities [footnote omitted].

And Representative Drinan described the relationship between the Act and the Eleventh Amendment as follows (122 Cong. Rec. H12160 (daily ed., October 1, 1976)):

> The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th amendment. That amend-

> ment limits the power of the Federal courts to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick against Bitzer. Since this bill is enacted pursuant to the power of Congress under section 2 of the 13th amendment and section 5 of the 14th amendment, any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants.

See also H.R. Rep. No. 94–1558, *supra,* at 7 n. 14.

Petitioners accurately note (Br. 8) that Congress did not provide for the naming of States and their agencies as defendants in cases brought under 42 U.S.C. 1983.[10] But that does not preclude the award of attorney's fees to be paid from state funds in cases successfully brought against state officials under that statute. That is the result Congress specifically intended in the legislative history quoted above.

In doing so, Congress correctly recognized that there is no requirement that a state must be a named defendant for the court to issue an order requiring the expenditure of state funds. In *Fitzpatrick* v. *Bitzer, supra,* on which Congress relied, this Court

[10] 42 U.S.C. 1983, quoted *supra* at pp. 2–3, authorizes only suits against "persons" acting under color of law. States and their agencies are not "persons" within the meaning of Section 1983. Cf. *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 452; *Monroe* v. *Pape*, 365 U.S. 167, 187–191. In contrast, the Attorney's Fees Awards Act does not refer to "persons"—it simply provides that the court may award the "prevailing party" a reasonable attorney's fee as part of the costs. That is precisely what was done here.

upheld an award of backpay and attorney's fees to be paid from state funds, although neither the state nor any state agency was a named defendant. See *United States* v. *Donaldson,* 429 U.S. 413, 448 n. 4, 451.[11] States commonly bear the costs of litigation in suits against state officials in their official capacities.[12] Moreover, since the state confers upon its officers the authority to act on its behalf, it is entirely appropriate to require the state to pay attorney's fees in civil rights suits challenging those actions, regardless of whether the state or any of its agencies has been named as a defendant.

2. An Award Of Attorney's Fees Has Only An Ancillary Effect On The State Treasury

Wholly apart from the fact that Congress was exercising its Thirteenth and Fourteenth Amendment enforcement powers against the states when it enacted the Attorney's Fees Awards Act, the payment of counsel fees has in any event only an "ancillary effect" on the state treasury under the rationale of *Edelman* v. *Jordan,* 415 U.S. 651, and therefore does not abrogate the state's sovereign immunity preserved by the Eleventh Amendment.

[11] This Court's decisions in *Graham* v. *Richardson*, 403 U.S. 365, 367, 369, and *Goldberg* v. *Kelly*, 397 U.S. 254, 261, also resulted in increased state expenditures for welfare programs, even though the named defendants were state and local officials, not the states or any of their agencies.

[12] See, *e.g.*, Ark. Stats., 1947 § 12–712 (1968 Repl.) (directing the Attorney General to represent "all state officers * * * in all litigation where the interests of the state are involved"); Ann. Cal. Gov. Code § 825 *et seq.* (West Cum. Supp. 1977).

Under the long-standing doctrine of *Ex parte Young,* 209 U.S. 123, equitable relief may be secured against the enforcement of an unconstitutional state statute notwithstanding any incidental drain on the state treasury resulting from the cost of compliance with the court's mandate. *Edelman* v. *Jordan, supra,* 415 U.S. at 668. This Court has also held that litigation costs may be taxed against the states. *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70. We submit that attorney's fees are an incidental cost of securing compliance with federal laws analogous to other litigation costs. They are not, as petitioners contend, the equivalent of money damages designed to redress or punish past misconduct, and thus within the purview of the Eleventh Amendment.

The Court in *Edelman* v. *Jordan, supra,* while acknowledging that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night" (415 U.S. at 667), nonetheless provided considerable guidance for distinguishing the two by describing the salient characteristics of each. The sort of relief that is barred is "a liability which must be paid from public funds" (*id.* at 663); "an accrued monetary liability which must be met from the general revenues" (*id.* at 664); "payment of a very substantial amount of money which * * * should have been paid, but was not" (*ibid.*); "'use [of] state funds to make reparation for the past'" (*id.* at 665); "retroactive payments" (*id.* at 666 n. 11); and "payment of state

funds * * * as a form of compensation" (*id.* at 668). These characteristics lead to the general conclusion that money relief is barred when "it is in practical effect indistinguishable in many aspects from an award of damages against the State" (*ibid.*).

An award of attorney's fees does not share these characteristics. It is not akin to damages: it is intended neither to compensate the victims of, nor to punish the state for, past illegal conduct.

Rather, the award of counsel's fees is much closer to the sort of draw upon the state treasury, permitted by *Ex parte Young* and *Edelman* v. *Jordan,* that comes about as the "necessary consequence of compliance in the future with a substantive federal-question determination" (415 U.S. at 668; see also *id.* at 665). While the payment of attorney's fees is not identical to the increased funding of state programs required as a practical matter as a result of this Court's decisions in *Graham* v. *Richardson,* 403 U.S. 365, and *Goldberg* v. *Kelly,* 397 U.S. 254 (see 415 U.S. at 667–668), the differences militate in favor of the inclusion of attorney's fees among the genre of awards allowable. As the Court stated in *Edelman* v. *Jordan,* "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature" (415 U.S. at 667–668). The prospect of an award of counsel fees is in many cases a necessary prerequisite to the bringing of the suit itself. If the Eleventh Amendment does not protect the states from having "to spend money from the state treasury" "in order to shape

[its] conduct to the mandate of the Court's decrees" (415 U.S. at 668), then surely it should not be the basis for defeating such suits in the first place, which would be the likely result of a rule barring awards of attorney's fees against the states. Like the other costs of the litigation, the fee award is merely part of the cost of bringing the state into future compliance by means of the litigation itself. In short, such an award, like the fiscal consequence to the state resulting from the need to comply with a judicial decree, has only "an ancillary effect on the state treasury [which] is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*" (*ibid.*).[13]

[13] Although the circuits are split on the issue, most agree that an award of attorney's fees to be paid by the state is not barred by the Eleventh Amendment. See, *e.g.*, *Souza* v. *Travisono*, 512 F. 2d 1137 (C.A. 1), vacated, 423 U.S. 809; *Class* v. *Norton*, 505 F. 2d 123, 125 (C.A. 2); *Jordan* v. *Fusari*, 496 F. 2d 646, 651 (C.A. 2); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.) affirmed, 409 U.S. 942. The Seventh Circuit follows the same rule, finding *Sims* v. *Amos*, *supra*, controlling, *Bond* v. *Stanton*, 528 F. 2d 688, vacated and remanded for further consideration in light of Pub. L. 94–559, 429 U.S. 973, as does the Ninth, *Brandenburger* v. *Thompson*, 494 F. 2d 885. See also *Thonen* v. *Jenkins*, 517 F. 2d 3 (C.A. 4); *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017 (C.A. 1), certiorari denied, 421 U.S. 910.

The Sixth Circuit has held that a state's immunity bars an award of attorney's fees, *Jordon* v. *Gilligan*, 500 F. 2d 701, certiorari denied, 421 U.S. 991, relying on *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (C.A. 3), vacated and remanded for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, and *Wood* v. *Strickland*, 420 U.S. 308, 421 U.S. 983. A subsequent Sixth Circuit decision to like effect, *Taylor* v. *Perini*, 503 F. 2d 899, was vacated and remanded for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, 421 U.S. 982. See, also,

As Mr. Justice Stevens noted in his concurrence in *Fitzpatrick* v. *Bitzer* (427 U.S. at 460), this result in essence merely restates the doctrine of *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70, where the state attempted to assert its sovereignty as a bar to an award of costs against it. This Court held that it was justified "in treating the state just as any other litigant and in imposing costs upon it as such" (*id.* at 77) since the case was brought to the Court not "by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such" (275 U.S. at 74). It should be no different in any federal court. "[T]o the extent states and state officials are, under our federal system, amenable to suit in federal courts, they should be responsible for costs and fees incidental to litigation to the same degree as others" (*Souza* v. *Travisono*, 512 F. 2d 1137, 1140 (C.A. 1), vacated, 423 U.S. 809).[14]

Named Individual Members of San Antonio Conservation Society v. *Texas Highway Dist.*, 496 F. 2d 1017 (C.A. 5). See, generally, Note, *Attorneys' Fees and the Eleventh Amendment*, 88 Harv. L. Rev. 1875 (1975).

[14] The State of California, in its brief *amicus curiae* (p. 6), states that *Sprague* v. *Ticonic Bank*, 307 U.S. 161, establishes that an award of attorney's fees is "quite unlike" an award of taxable costs. But that case simply held that attorney's fees and taxable costs were sufficiently distinct so that a claim for the latter did not constitute a waiver of reimbursement for the former (*id.* at 168). Nothing in *Sprague* is inconsistent with our contention that at least where, as here, the underlying statute provides for an award of attorney's fees, there is no analytical difference between costs and attorney's fees for purposes of considering whether they are allowed by *Ex parte Young* or barred by the Eleventh Amend-

This Court has already affirmed a decision reaching this result, *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), summarily affirmed, 409 U.S. 942.[15] There the district court taxed attorney's fees against the state, ruling that a state was without immunity in suits brought under the doctrine of *Ex parte Young*. In its Jurisdictional Statement the state protested the award as an unlawful abrogation of its sovereign immunity, and this Court's affirmance apparently rejected that

ment. See *Souza* v. *Travisono*, *supra*, 512 F. 2d at 1140; *Class* v. *Norton*, *supra*, 505 F. 2d at 125; *Taylor* v. *Perini*, *supra*, 503 F. 2d at 909 (Edwards, J., dissenting). Indeed, the applicable statutory provision here, the Attorney's Fees Awards Act, provides for an award of attorney's fees "as part of the costs."

[15] Petitioners incorrectly suggest (Br. 17) that *Sims* v. *Amos* is undercut by this Court's summary affirmance, 421 U.S. 972, of the denial of attorney's fees in *Murgia* v. *Mass. Bd. of Retirement*, 386 F. Supp. 179 (D. Mass.). In *Murgia*, a state police officer challenged as unconstitutional a statute that required his retirement solely because he had reached age 50. A three-judge court held the statute unconstitutional (376 F. Supp. 753), but refused to award counsel fees in the absence of a statute permitting the award, both because of the Eleventh Amendment "and as a matter of discretion" (386 F. Supp. at 182). This Court's summary affirmance of that refusal is not a significant precedent on the question whether an award of counsel fees to be paid by a state agency is barred by the Eleventh Amendment, since the Court may have concluded that the case did not come within any of the exceptions to the "American Rule" permitting the awarding of counsel fees without specific statutory authorization or that, even if it did, it was within the trial court's discretion to decline to make such an award. (This Court subsequently reversed the district court's judgment on the merits, 427 U.S. 307.)

claim on the merits. Cf. *Hicks* v. *Miranda*, 422 U.S. 332, 344–345.[16]

B. THE ACT APPLIES TO CASES SUCH AS THIS, PENDING ON THE DATE OF ENACTMENT

This case was instituted in April 1969; the award of counsel fees at issue here was for legal services rendered after the court of appeals' remand in November 1974 (Pet. App. 14).[17] The fact that a substantial part of the services were completed before the Act's passage does not affect the validity of the award. We have discussed in our brief amicus in *Zurcher* v. *Stanford Daily*, and *Bergna* v. *Stanford Daily*, Nos. 76–1484 and 76–1600, the reasons why we believe the Act authorizes payment for services rendered before it was enacted, under the principles of *Bradley* v. *Richmond School Board*, 416 U.S. 696.[18]

[16] The Seventh Circuit so held in *Bond* v. *Stanton*, supra, note 13. *Brandenburger* v. *Thompson*, *supra*, 494 F. 2d at 888, also relied on this Court's affirmance in *Sims* v. *Amos* in holding attorney's fees allowable. See also *Taylor* v. *Perini*, *supra*, 503 F. 2d at 907–908 (Edwards, J., dissenting) (affirmance in *Sims* binding); *Newman* v. *State of Alabama*, 522 F. 2d 71, 72–80 (C.A. 5) (Gewin, Brown, Wisdom, Thornberry, Goldberg, JJ., dissenting from remand for reconsideration of attorney's fees issue) (semble). Contra, *Skehan* v. *Board of Trustees of Bloomsburg State College*, *supra*, 501 F. 2d at 42 n. 7; *Jordan* v. *Gilligan*, *supra*, 500 F. 2d at 706–709; *Taylor* v. *Perini*, *supra*, 503 F. 2d at 905 (by implication).

[17] In 1973, the district court allowed respondent's then counsel an $8,000 fee, which was paid by the Department of Correction (Pet. App. 82).

[18] We are sending the parties to this litigation a copy of our amicus brief in *Stanford Daily*.

CONCLUSION

The award of attorney's fees should be affirmed.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
DREW S. DAYS, III,
Assistant Attorney General.
WALTER W. BARNETT,
DENNIS J. DIMSEY,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1660

TERRELL DON HUTTO, *et al.*,

Petitioners,

—v.—

ROBERT FINNEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
EIGHTH CIRCUIT COURT OF APPEALS

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, ACTION ON SMOKING AND HEALTH, THE CHILDREN'S DEFENSE FUND, CONCERNED CITIZENS FOR JUSTICE, CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., THE COUNCIL FOR PUBLIC INTEREST LAW, EQUAL RIGHTS ADVOCATES, THE FOOD RESEARCH AND ACTION CENTER, THE INDIANA CENTER ON LAW AND POVERTY, THE LAWYERS MILITARY DEFENSE COMMITTEE, THE LOS ANGELES CENTER FOR LAW IN THE PUBLIC INTEREST, THE MASSACHUSETTS ADVOCACY CENTER, THE MENTAL HEALTH LAW PROJECT, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE MIGRANT LEGAL ACTION PROGRAM, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL COUNCIL OF SENIOR CITIZENS, THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, THE NATIVE AMERICAN RIGHTS FUND, OFICINA LEGAL DEL PUEBLO UNIDO, THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, THE RUTGERS UNIVERSITY CONSTITUTIONAL LITIGATION CLINIC, THE SAN FRANCISCO LAWYERS COMMITTEE FOR URBAN AFFAIRS, THE SOUTHERN POVERTY LAW CENTER, TAX ANALYSTS AND ADVOCATES, THE UNIVERSITY OF MARYLAND DEVELOPMENTAL DISABILITIES PROJECT, THE UNIVERSITY OF MICHIGAN CLINICAL LAW PROGRAM, THE WESTERN LAW CENTER FOR THE HANDICAPPED, THE WISCONSIN CENTER FOR PUBLIC REPRESENTATION, THE WOMEN'S LAW PROJECT, and THE YOUTH LAW CENTER, *Amici Curiae*

BRUCE J. ENNIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

BURT NEUBORNE
New York University
School of Law
Washington Square South
New York, New York 10012

RICHARD EMERY
New York Civil Liberties
Union Foundation
84 Fifth Avenue
New York, New York 10011

Attorneys for Amici Curiae

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INTEREST OF AMICI CURIAE

Amici are thirty-one organizations providing legal representation for interests that historically have been unrepresented or under-represented:

AMERICAN CIVIL LIBERTIES UNION. The ACLU is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the safeguards of the Bill of Rights.

ACTION ON SMOKING AND HEALTH serves as the "legal arm" of the anti-smoking population, working on the establishment of smoking and non-smoking sections in public places and the removal of cigarette commercials from radio and TV.

THE CHILDREN'S DEFENSE FUND works on national social policy issues as they affect children. Its program priorities include the right to an education, a child's

right to privacy, health care, juvenile justice, rights of children to comprehensive development services, and the protection of children used as research subjects.

CONCERNED CITIZENS FOR JUSTICE is a small community-based legal services and law reform project in southwestern Virginia. It works on consumer protection, occupational health and safety, and welfare benefit issues.

CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC., provides representation for challenges to discriminatory practices against women in such areas as employment, education, credit, and insurance.

THE COUNCIL FOR PUBLIC INTEREST LAW, created under the joint sponsorship of the American Bar Association and three foundations active in supporting public interest law, works to foster the growth of public interest law by developing and distributing

detailed information about the financing and activities of various public interest legal organizations.

EQUAL RIGHTS ADVOCATES specializes in the area of sex discrimination, including employment, health care, and prison reform issues.

THE FOOD RESEARCH AND ACTION CENTER specializes in food benefit matters. Issues of importance include food stamp benefits, national school breakfast and lunch programs, and special nutrition programs for pregnant women, infants, and children.

THE INDIANA CENTER ON LAW AND POVERTY, INC. provides policy-oriented representation to Indiana's poor on such issues as welfare benefits , utility rate reform, employment, and criminal justice.

THE LAWYERS MILITARY DEFENSE COMMITTEE provides free civilian counsel for American servicemen overseas.

THE LOS ANGELES CENTER FOR LAW IN THE PUBLIC INTEREST provides representation on a variety of issues, particularly environmental protection, corporate accountability and employment discrimination.

THE MASSACHUSETTS ADVOCACY CENTER addresses educational and other social welfare issues affecting children throughout the state. Its priorities include the right to an education, special education, child health, protection of children used as research subjects, the juvenile justice system, and access to public information.

THE MENTAL HEALTH LAW PROJECT works to protect the rights of the mentally impaired. Its docket includes cases establishing a patient's right to treatment, challenging the use of patients as unpaid

laborers, challenging civil commitment procedures, and establishing the right of mentally handicapped children to a public education.

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND works on behalf of Mexican American citizens; its area of heaviest concentration concerns equal rights in employment, education and voting.

THE MIGRANT LEGAL ACTION PROGRAM works on a range of issues on behalf of migrant workers, including housing, welfare benefits, health care, and occupational safety and health.

THE NATIONAL CONFERENCE OF BLACK LAWYERS is a bar association with an active public interest law program. Most of its public interest work concerns criminal justice reform, but it also works to eliminate discriminatory practices in education, employment, and in the military.

THE NATIONAL COUNCIL OF SENIOR CITIZENS represents the interests of the elderly before federal, state, and local administrative agencies.

THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS works exclusively to reform or eliminate state, local or national laws regarding the use of marijuana. Issues of concern include the employment of marijuana users, medical prescription of the drug, and the private possession of small quantities of marijuana.

THE NATIVE AMERICAN RIGHTS FUND is a national Indian Law firm. Its priorities include protecting Indian treaty rights, insuring the independence of Indian tribes, protecting Indian lands, water, minerals, and other natural resources, civil rights, and governmental accountability. NARF also functions as a Legal Services support center on Indian law.

OFICINA LEGAL DEL PUEBLO UNIDO engages in litigation and community legal education on behalf of the interest of farm workers.

THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA provides representation in a broad range of issue areas on behalf of various disadvantaged minority clients within Philadelphia and the state. It is concerned with juvenile justice, employment discrimination, health care, the rights of the mentally and physically handicapped, and other issues.

THE RUTGERS UNIVERSITY CONSTITUTIONAL LITIGATION CLINIC challenges unconstitutional practices and laws which infringe upon people's rights, such as the unequal allocation of public funds for education in the state, government misconduct, and employment discrimination.

THE SAN FRANCISCO LAWYERS COMMITTEE FOR URBAN AFFAIRS provides representation for various disadvantaged minorities and poor persons on such issues as voting rights, employment discrimination, educational opportunities, and criminal justice reform.

THE SOUTHERN POVERTY LAW CENTER works through litigation directed at enforcing and protecting the civil rights of the South's rural poor. It concentrates on criminal justice reform and has a "death penalty" project aimed at overturning death penalty statutes and eliminating death sentences.

TAX ANALYSTS AND ADVOCATES, concerned solely with federal tax reform, works to insure that the IRS is fairly implementing the tax laws and that citizens' interests are represented in the decision-making process. It also provides analysis on tax policy and tax issues.

THE UNIVERSITY OF MARYLAND DEVELOPMENTAL DISABILITIES PROJECT is a law reform program whose purpose is to advocate on behalf of developmentally disabled (mentally retarded, cerebral palsied, epileptic, autistic, and other severely disabled) persons.

THE UNIVERSITY OF MICHIGAN CLINICAL LAW PROGRAM provides legal services to indigent persons in the Ann Arbor area.

THE WESTERN LAW CENTER FOR THE HANDICAPPED provides legal services to handicapped persons for problems involving their disabilities.

THE WISCONSIN CENTER FOR PUBLIC REPRESENTATION, Wisconsin's only autonomous public interest law center devoted entirely to policy-oriented representation, directs its attention to such matters as equal rights for ex-offenders, fair credit standards for women, land use policy, governmental accountability, health care issues,

and corporate responsibility.

THE WOMEN'S LAW PROJECT (Philadelphia) works to implement federal and state equal rights amendments, and to challenge discrimination in employment, education, family planning, and health care.

THE YOUTH LAW CENTER works on behalf of children in the western half of the country. Areas of concern include juvenile law, mental health law, the rights of juvenile offenders, education law, and conditions in juvenile institutions.

* * *

Although Amici provide representation for a variety of individuals and groups espousing widely varying viewpoints, they have a common, overriding concern: important constitutional rights, and statutory rights secured through successful exercise of the political process, are daily rendered nullities for lack of enforcement.

Congress shares this concern. The Senate Report recommending passage of the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 42 U.S.C. §1988, states:

> "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." See also H. Rep. No. 94-1558, 94th Cong., 2d Sess., p. 1. S. Rep. No. 94-1011, 94th Cong., 2d Sess. p. 1.

Congress enacted P.L. 94-559 in order to facilitate enforcement of the civil rights it had labored so long to secure, by enabling people without means to employ skilled attorneys. Amici public interest legal organizations and the persons they represent are thus the intended beneficiaries of P.L. 94-559. Their interest is substantially the same as the Congressional interest: they seek to provide persons whose rights have been violated and who cannot afford legal counsel with "effective access to the judicial process where their grievances can be resolved according to law." (H. Rep. No. 94-1558, 94th Cong., 2d Sess., p. 1).

This brief will argue that Congress carefully followed the analysis suggested in prior decisions of the Court in seeking to accomplish this important goal. Amici urge the Court to resolve the issues presented in light of Congress' broad remedial purpose.*

* As the Court has been informed in a letter to the Clerk, Amici have received consent from both parties to file this brief.

Statement of the Case

After ten years of litigation devoted to establishing minimum standards of decency in the Arkansas prison system, the United States District Court for the Eastern District of Arkansas awarded $20,000 to plaintiffs' court appointed counsel as a reasonable fee for services rendered during a segment of the litigation. In addition, the District Court directed that other costs be assessed in favor of the plaintiffs. The fees and costs were both assessed against the Arkansas Department of Correction, which receives its funding from the State of Arkansas.[1] The District Court

1 The Arkansas Department of Correction was not named as a party-defendant in the District Court, presumably because plaintiffs feared it would not be deemed a "person" within the meaning of 42 U.S.C. §1983. However, the Commissioner of Correction of Arkansas and other officials who, collectively, constituted the upper echelons of the Department were named as individual defendants and the action was defended by the Attorney General of Arkansas. [Footnote Continued]

based its power to award attorney's fees first, on the Civil Rights Attorney's Fees Awards Act of 1976(P.L. 94-559;42 USC §1988), and second, on the "bad faith" exception to the American rule on attorney's fees recognized in Aleyeska Pipeline Service Company v. Wilderness Society, Inc., 421 U.S. 240 (1975) (hereafter, Aleyeska). The Eighth Circuit noted ample evidence in the record to support an award under the "bad faith" exception, but rested its affirmance on the 1976 Act. Finney v. Hutto, 548 F. 2d 740, 742 (8th Cir. 1977).

[Footnote 1 Continued]

Since the individual defendants are "persons" within the meaning of 42 U.S.C. §1983 and since Ex parte Young,209 U.S. 123 (1908) holds that state officials acting outside the scope of the Federal constitution are not entitled to Eleventh Amendment immunity, the District Court possessed unquestioned power to grant prospective relief on the merits, despite its obvious impact on the State of Arkansas.

Despite the active participation of the State of Arkansas in defending the litigation in the District and Circuit Courts, and despite the substantial benefits which inure to the people of Arkansas as a direct result of the elimination of barbaric and unconstitutional practices from the Arkansas penal system, petitioners contest the power of the District Judge to award reasonable attorney's fees against the Arkansas Department of Correction.[2] However, neither the Eleventh Amendment nor

2 Petitioners do not contest the amount of the award, apparently recognizing that it is an extremely reasonable fee for the time, energy and expertise expended by plaintiffs' counsel. Nor do petitioners contest the award of costs. The District Court's award of $2,000 in costs tracked the provisions of Rule 54(d) F.R.C.P. Recognizing that Fairmont Creamery Company v. Minnesota, 275 U.S. 70 (1927), clearly authorizes such an award, petitioners do not contest it in this Court.

any other impediment precluded the District Court from requiring the Arkansas Department of Correction to absorb a portion of the unavoidable economic costs of constitutional adjudication.

SUMMARY OF ARGUMENT

Amici contend that the award of reasonable attorney's fees against the Arkansas Department of Correction was not barred by the Eleventh Amendment (Point I.).

The Eleventh Amendment was designed only to preserve sovereign immunity as it existed in 1789, and was not designed as a new, independent and affirmative basis for sovereign immunity (Point I.A.).

The Court has recognized three methods for restricting the sovereign immunity preserved by the Eleventh Amendment: inherent surrender, individual waiver, and Congressional override (Point I.B.).

Those methods, as applied in the circumstances of this case, justify an award of attorney's fees against the Arkansas Board of Correction (Point I.C.).

Specifically, Congress has determined that attorney's fees are a part of costs, and this Court has ruled that the Eleventh Amendment does not preclude an award of costs against a state entity (Point I.C.1). Relying on its power under section 5 of the Fourteenth Amendment, Congress has expressly overridden sovereign immunity with respect to fee awards in civil rights cases (Point I.C.2). And the "bad faith" of the state defendants in failing to implement a lawful district court order jeopardized the integrity and supremacy of federal court orders, and therefore justified an award of attorney's fees for services necessary to implement the order (Point I.C. 3).

ARGUMENT

I. THE AWARD OF REASONABLE ATTORNEY'S FEES AGAINST THE ARKANSAS DEPARTMENT OF CORRECTION WAS NOT BARRED BY THE ELEVENTH AMENDMENT

A. The Scope of Sovereign Immunity Preserved by the Eleventh Amendment.

Read literally, the limitation on "the judicial power of the United States" imposed by the Eleventh Amendment is both unduly narrow and unduly broad. Literally,

the Eleventh Amendment bans only suits against a state by citizens of another state, leaving states vulnerable to Federal actions brought by their own citizens.[3] Conversely, a literal reading of the Eleventh Amendment would preclude a state

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3 The "narrow" literal reading of the Eleventh Amendment was rejected in Hans v. Louisiana, 134 U.S. 1 (1890) and has been rejected by a majority of the current Court. Eg. Edelman v. Jordan, 415 U.S. 651 (1974). Mr. Justice Brennan has consistently urged the "narrow" literal reading. Eg. Edelman v. Jordan, 415 U.S. 651, 687 (1974) (dissenting). However, Mr. Justice Brennan's recognition that state sovereign immunity exists as a bar to a suit in a Federal court independently of the Eleventh Amendment renders the practical result of his position similar to the non-literal reading espoused by the majority and discussed infra. Under both approaches, the determinative element is not the literal wording of the Eleventh Amendment, but the judge-made doctrine of state sovereign immunity.

from consenting to be sued in Federal court, and might well bar Supreme Court appellate review of cases involving states as parties-defendants.[4]

Accordingly, instead of a literal reading, this Court has construed the Eleventh Amendment to advance its historic purpose--overruling the rationale of Chisholm v. Georgia, 2 Dall. 419 (1783). In Chisholm, a majority of the Court ruled that the language of Article III of the Constitution placing controversies between a state and the citizens of another state within the judicial power of the United States

4 The "broad" literal reading of the Eleventh Amendment has never commanded respect, and has been implicitly rejected by the Court in numerous cases recognizing that a state may consent to be sued in Federal court, Eg. Clark v. Barnard, 108 U.S. 436 (1883); Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), and in numerous cases entertaining Supreme Court appeals from state court decisions in which a state is a party.

effected a waiver of state sovereign immunity.[5] In his dissent in Chisholm, Justice Iredell argued that the states, in ratifying Article III, had not intended to waive sovereign immunity over all controversies described in Article III. Instead, he argued, traditional pre-1789 notions of sovereign immunity survived the adoption of Article III. In the outcry which followed the announcement of the Court's decision in Chisholm, it became clear that

5 Chisholm involved a suit in assumpsit by South Carolina executors of a British creditor of the State of Georgia. Much of the controversy during the 1790's surrounding the jurisdiction of Federal courts over state defendants involved a concern over the extent to which Federal courts would be permitted to dictate the conditions under which state Revolutionary War debts were to be re-paid. The irony of British creditors suing to enforce Georgia's Revolutionary War debt seemed lost on the participants in Chisholm. Feeling against the Chisholm decree ran so high in Georgia that the legislature made it a felony punishable by death without benefit of clery to seek to enforce the Court's mandate in Chisholm.

Justice Iredell's understanding of the intent of the states in ratifying Article III was correct. Accordingly, the Eleventh Amendment was drafted and ratified to make clear that the mere adoption of Article III had not acted to override the sovereign immunity enjoyed by the states prior to the ratification of the Constitution.

Viewed in historical context, therefore, the apparently overly narrow and overly broad literal wording of the Amendment becomes understandable. Its narrowness is attributable to the fact that the precise holding of Chisholm involved a suit by a citizen of South Carolina against the State of Georgia pursuant to the language of Article III placing such "diversity" suits within the judicial power of the United States. Thus, the Amendment was couched in terms of the "diversity" power in order to rebut the notion that the "diversity" language had effected a waiver of sovereign immunity. Its breadth is attributable to the desire of the draftsmen to "erase" the notion that merely because a claim fell

within the judicial power of the United States as described in Article III, state sovereign immunity against that claim was destroyed by the operation of Article III. Because Chisholm had adopted that rationale, the draftsmen of the Eleventh Amendment sought to rebut it by removing the category of claims in question from "the judicial power of the United States."[6]

Read in terms of its purpose, therefore, the Eleventh Amendment merely "erases" the notion that the ratification of Article

6 Given the jurisdictional provisions of the Judiciary Act of 1789, little if any concern was paid by the draftsmen of the Eleventh Amendment to cases arising un-under the Constitution or laws of the United States, since general Federal question jurisdiction was not granted to the lower Federal courts until 1875. Indeed, it is possible to argue persuasively that Federal question cases were not intended to be within the coverage of the Eleventh Amendment at all. Cohens v. Virginia, 6 Wheat. 264 (1821). But see Governor of Georgia v. Medrazo, 1 Pet. 110 (1828); Hans v. Louisiana, 134 U.S. 1 (1896).

III by the states constituted a total waiver of state sovereign immunity against all claims falling within the judicial power of the United States. Thus, this Court has properly viewed the Amendment not as a new, independent, and affirmative bar to the assertion of subject matter jurisdiction by the Federal courts; but rather as a negative bar which simply preserves the states' pre-1789 sovereign immunity from repeal by implication at the hands of Article III.[7]

B. Recognized Methods for Restricting Sovereign Immunity.

The Court has recognized three methods by which pre-1789 state sovereign immunity, as preserved by the Eleventh Amendment, may be restricted.

7 Since "local" entities did not enjoy sovereign immunity under pre-1789 standards, the Court has consistently declined to afford municipalities or other local organs of government Eleventh Amendment immunity. [Footnote Continued]

1. "Inherent Surrender" as a Restriction of Pre-1789 Sovereign Immunity.

First, the Court has recognized that in electing to join a Federal union, the states inherently surrendered certain aspects of pre-1789 sovereign immunity.[8] Thus, the Court has long held that actions in Federal court by the United States against a state defendant are not barred by surviving concepts of sovereign immunity since in joining a Federal union states of necessity surrendered sovereign immunity vis a vis the United States. Compare, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) (recognizing immunity

[Footnote 7 Continued]
Eg. Lincoln County v. Luning, 133 U.S. 529 (1890); Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). Amici assume the Arkansas Board of Correction is an Eleventh Amendment entity, although the issue is not free from doubt.

8 See generally, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); the Supremacy Clause, Article VI, clause 2; and The Federalist, No. 81.

against suits by foreign states) with United States v. Texas, 143 U.S. 621 (1892) (rejecting immunity against suits by the United States). See also, United States v. Maine, 420 U.S. 515 (1975); United States v. Mississippi, 380 U.S. 128, 138-141 (1965); United States v. California, 297 U.S. 175 (1936). Similarly, this Court has long entertained appeals from state courts despite the presence of state party defendants, because in joining a Federal union, states of necessity surrendered sovereign immunity in cases involving appellate review by the Supreme Court. Cf. Cohens v. Virginia, 6 Wheat. 264 (1821); Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). Moreover, this Court has recognized that by joining a Federal union, states of necessity surrendered sovereign immunity against prospective equitable relief aimed at compelling future adherence to Federal constitutional norms. Eg. Ex parte Young, 209 U.S. 123 (1908). Finally, this Court has long recognized that costs may be imposed by a Federal court upon a state without

violating the Eleventh Amendment, because in joining a Federal union, states of necessity surrendered sovereign immunity against the allocation of reasonable dispute-resolution expenses incurred in resolving cases within the jurisdiction of the Federal courts. Eg., Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927).

2. Individual Waiver as a Restriction of Pre-1789 Sovereign Immunity

Second, this Court has recognized that a state may, if it wishes, waive aspects of its sovereign immunity, and consent to suit in cases that appear barred by the literal language of the Eleventh Amendment and which cannot be classified as within the "inherent surrender" concept discussed supra. Eg., Clark v. Barnard, 108 U.S. 436 (1883); Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964). Such "consents" to suit may be explicit, or may

be manifested by the conduct of individual states.

3. Congressional Override as a Restriction of Pre-1789 Sovereign Immunity

Third, this Court has recognized that state sovereign immunity, as preserved by the Eleventh Amendment, is subject to collective override(or collective waiver) by the representatives of the state sitting as the Congress of the United States; at least when the override or waiver is linked to the enforcement of Fourteenth Amendment rights. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).[9] See also, Tribe," Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism," 89 Harv. L. Rev. 682 (1976).

9 Whether Congress may override Eleventh Amendment immunity acting pursuant to other provisions of the Constitution is an open question. But given the explicit reliance by Congress in enacting the attorney's fees [Footnote Continued]

C. In The Circumstances of this Case, Sovereign Immunity Does Not Preclude An Award of Attorney's Fees Against the Arkansas Board of Correction.

In the circumstances of this case, the sovereign immunity preserved by the Eleventh Amendment has been restricted under the doctrines of inherent surrender and Congressional override.

1. Congress has determined that attorney's fees are a part of costs, and the Eleventh Amendment does not preclude an award of costs against a state entity.

[Footnote 9 Continued]
provisions of P.L. 94-559 on Section 5 of the Fourteenth Amendment, (see discussion infra),it is unnecessary in this case to explore whether Congress possesses override power pursuant to other sections of the Constitution or whether Courts possess power under Section 1 of the Fourteenth Amendment to imply constitutionally based causes of action which override the Eleventh Amendment. See generally, Ex parte Young, 209 U.S. at 148-149; Edelman v. Jordan, 415 U.S. 651, 694 n. 2 (1974) (Mr. Justice Marshall, dissenting).

Resolution of the Eleventh Amendment question in this case is controlled by applicable and settled precedents of this Court. It is settled that the Eleventh Amendment does not bar the assessment of costs against a state entity. Fairmont Creamery v. Minnesota, 275 U.S. 70, 74 (1927). As the Court recognized in Fairmont, the states inherently surrendered sovereign immunity with respect to litigation costs in federal courts (275 U.S. at 74).

It is equally settled under Aleyeska, supra, that Congress has the power to define costs (421 U.S. at 250-257).[10]

10 In Aleyeska, the Court noted (pp. 250-257) that in 1842, Congress delegated that power to the Supreme Court only to reassert the power again in 1853 in a statute including carefully limited attorney's fees as costs. The Court "repeatedly enforced" that Act. At present, various sections of the United States Code embody the exercise of Congressional power to define particular items as costs, E.g., 28 U.S.C. §1920 and §1923(a); 15 U.S.C. §78i(e); 33 U.S.C. §1365(d).

Congress has exercised that power and has specified in P.L. 94-559 that attorney's fees may be awarded "as part of the costs." Accordingly, even without reference to the legislative history of P.L. 94-559, it is clear under Fairmont and Aleyeska that the Eleventh Amendment does not preclude an award of attorney's fees as part of costs against a state entity.

Reference to legislative history shows that the decision to characterize attorney's fees as part of costs was not accidental, and that Congress expressly cited and relied upon both Fairmont and Aleyeska to ensure that attorney's fees would not be barred by the Eleventh Amendment.[11]

11 E.g., S. Rep. 94-1011,94th Cong., 2d Sess., p. 4, p. 5, note 6; and H. Rep. 94-1558, 94th Cong., 2d Sess., p. 2. Congress also cited Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and may well have relied on the concurring opinion of Mr. Justice Stevens, in which he "would place
[Footnote Continued]

2. Congress has expressly overridden sovereign immunity in cases falling within the coverage of the civil rights attorney's fees awards act of 1976.

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court recognized that Congress has power, pursuant to Section 5 of the Fourteenth Amendment, to override the sovereign immunity preserved by the Eleventh Amendment. In enacting P.L. 94-559, Congress expressly relied upon that power in order to authorize attorney's fees awards against state entities.

In Fitzpatrick, plaintiffs sued state officials for relief that would indisputably flow from the state treasury. The state was

[Footnote 11 continued]
fees in the same category as other litigation costs," citing Fairmont. 49 L. Ed. 2d. at 624. See H. Rep. 94-1558, 94th Cong., 2d Sess., p. 7 note 14.

not named, but the Eleventh Amendment issue was raised. There was no dispute that a fee award against state officers acting in their official capacity was equivalent to an award directly against the state. Cf. Edelman v. Jordan, 415 U.S. 651 (1974). The Court held that the Eleventh Amendment was overridden by the 1972 amendments to the 1964 Civil Rights Acts (42 U.S.C. 2000e (a)), enacted under the authority of Section 5 of the Fourteenth Amendment. Attorney's fees were awarded pursuant to a statutory provision identical to P.L. 94-559, 42 U.S.C. §2000e-5(k), see Fitzpatrick, 49 L. Ed. 2d at 618 note 6.

To the extent that Congress has authorized relief against Eleventh Amendment entities pursuant to §5 of the Fourteenth Amendment, Fitzpatrick holds that sovereign immunity is no bar. Fitzpatrick, 49 L. Ed. 2d at 619. In Fitzpatrick, the Civil Rights Act of 1964 as amended authorized a compensatory award and attorney's fees against state officials to be paid out

of the state treasury. Here, although Congress has not provided for an award of compensatory damages directly against the state treasury, P.L. 94-559 has clearly provided the necessary "threshold authorization", Fitzpatrick, 49 L. Ed. 2d at 619, for a fee award against state entities. Fitzpatrick therefore squarely supports the fee award here.

The legislative history of P.L. 94-559 shows conclusively that Congress intended to use its power under §5 of the Fourteenth Amendment to abrogate state sovereign immunity under the Eleventh Amendment. The Senate Report, for example, concludes as follows:

> " Fee awards are therefore provided in cases covered by S. 2278 [P.L. 94-559] in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, §5. As with cases brought under 20 U.S.C. §1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys fees, like other items

> of costs, will be collected either directly from the official, in his official capacity, from the funds of his agency or under his control, or from the State or local government (whether or not the agency of government is a named party)." S. Rep. 94-1011, 94 Cong. 2d Sess., p. 5 (June 18, 1976). (Footnotes omitted; citing Fairmont Creamery v. Minnesota, 275 U.S. 168 (1927)).

Similarly, the House Report,[12] issued three months after the Senate Report, cites Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) for the proposition that fees may be collected from defendant state officials in their official capacities and that awards may be granted against state entities:

> "The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." (H. Rep., p. 7) (footnote omitted).

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12 H. Rep. 94-1558, 94th Congress 2d Sess., Sept. 15, 1976.

The footnote to that statement provides as follows:

> " Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. Fitzpatrick v. Bitzer, ____ U.S. ____, 96 S. Ct. 2666 (June 28, 1976)." (Id., note 14).

And in the House debates Representative Drinan, a sponsor of the bill, expressly characterized the bill as an abrogation of Eleventh Amendment immunity under Congressional authority granted in §5 of the Fourteenth Amendment[13] . That characterization was never questioned or disputed.

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13 "The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th amendment. That amendment limits the power of the Federal courts to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick against Bitzer. Since this bill is enacted pursuant to the power of Congress under section 2 of the
[Footnote Continued]

To assure that this intent would be effectuated, Congress intentionally and expressly "tracked" the language of P.L. 94-559 to parallel the language of 42 U.S.C. 2000e-5(k), the section at issue in Fitzpatrick.[14] Like P.L. 94-559, 42 U.S.C.

[Footnote 13 Continued]
13th Amendment and section 5 of the 14th amendment, any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants." 122 Cong. Rec. No. 151 part II, Daily Ed., October 1, 1976, p. H. 12160.

14 H.R. No. 94-1558, 94 Cong. 2d Sess. p. 5 and fn. 11. The House Report also emphasizes that Congress cast P.L. 94-559 in a mold that had already successfully passed judicial scrutiny. It states:

> "Keeping with that pattern [of awarding attorney's fees in other statutes], H.R. 15460 [P.L. 94-559] tracks the language of the counsel fee provisions of Title II and VII of the Civil Rights Acts of 1964 and Section 402 of the Voting Rights Act amendments of 1975." [Footnotes omitted]. H. No. 94-1558, 94 Cong. 2d Sess. 1976, p. 5 and fn. 11.

See, to the same effect, the Senate Report, which states:

> "S. 2278 [P.L. 94-559] follows the language of Title II and VII of the Civil Rights Act of 1974, 42 U.S.C. 2000a-3(b) and 2000e-5(k) and Section

[Footnote Continued]

2000e-5(k) authorizes awards of attorney fees to a "prevailing party." Thus, although the nature of the defendant--individual, official or state--is not specified in either statute, the Senate and House Reports show Congress believed that if Congress used the language approved in Fitzpatrick, the clear Congressional intent to override Eleventh Amendment prohibitions when state officials are defendants would not be questioned.

Finally, the language of P.L. 94-559 is comparable to the text of the Supreme Court rule in Fairmont Creamery v. Minnesota, 275 U.S. 70 (1927), which was held to authorize the imposition of costs against the State of Minnesota. See supra Point I.C. 1. In Fairmont, the Court noted that no exception existed in the text of the rule to accomodate a claim of state sovereign immunity. Accordingly, the Court

[Footnote 14 Continued]
402 of the Voting Rights Act Amendments of 1975." S.R. 94-1011, 94th Cong. 2d Sess., p. 2.

applied the rule literally to preclude a sovereign immunity claim advanced by Minnesota. Similarly, no such exception exists in the text of P.L. 94-559, and since its legislative history precludes such an exception, the Court should read P.L. 94-559 as authorizing awards against state entities.[15]

15 The Senate Report is consistent with the rest of the legislative history on this point. Furthermore, it emphasized this point by citing Fairmont Creamery. S. Rep. 94-1011, 94 Cong. 2d Sess., p. 5 (June 18, 1976). The Senate Report may also be viewed as relying on federal ancillary jurisdiction as a basis for an attorney fee award:

> " In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such complaince." S. Rep., p. 5.

This approach to an attorney's fees award against a non-party who has been part of the litigation from its inception was approved in Grimes v. Chrysler Motors Corp., ____ F. 2d ____ (No. 77-7247, 2nd Cir. slip opinion Nov. 17, 1977). See, to the same effect, Maynard v. Wooley, ____ F. Supp. ____ (D.N.H. Civil Action No. 75-57,
[Footnote Continued]

In short, the legislative history of P.L. 94-559 clearly manifests Congressional authorization of fee awards against state entities. And where, as in this case, a statute by its terms changes the rule of a recent Supreme Court decision, separation of powers and deference to a coordinate branch of government require the Court to examine and heed the legislative history of that statute in order to give it full effect. See United States v. American Trucking Association, 310 U.S. 534 (1939); Hart and Sachs, Legal Process, pp. 1243-1286 (1958).[16]

[Footnote 15 Continued]
Memorandum Opinion of Sept. 26, 1977), in which Circuit Court judges Coffin and (now) Bownes, and District Judge Gignoux awarded attorney's fees against New Hampshire, a non-party.

16 The legislative history also shows that Congress sought to encourage private enforcement of the civil rights acts by specifying that prevailing plaintiffs would routinely recover attorney's fees, whereas prevailing defendants would recover fees only if the litigation "was clearly frivalous, vexatious, or brought for harrassment purposes." S. Rep., supra, at 5. Compare EEOC v. Christiansburg, No. 76-1383, cert. granted, 45 U.S.L.W. 3822. Given the remedial purpose of P.L. 94-559, and the important public policies underlying it, the Court should give the act a broad construction consistent with the Congressional intent to do everything within its constitutional power to facilitate private enforcement of the civil rights acts.

3. The "bad faith" of the state defendants in failing to implement a lawful district court order jeopardized the integrity and supremacy of federal court orders, and therefore justified an award of attorney's fees for services necessary to implement the order.

Because the Congressional power and intent to override sovereign immunity is so clear, it should not be necessary for the Court to reach this point. Similarly, if it does reach this point it is not necessary to decide, in general, whether bad faith in unreasonably defending litigation justifies an award of attorney's fees. The bad faith in this case was primarily bad faith in failing to implement a lawful order and judgment of a federal court. See Finney v. Hutto, 410 F.Supp. 251 at 284-85 (D. Ark. 1976). In adopting Article III of the Constitution, the states inherently surrendered to federal courts the power to issue orders necessary to implement their lawful judgments, even when those orders have an effect on state treasuries. E.g., Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927).

In this case, the District Court premised its award of attorney's fees both on its inherent power to award fees in cases in which a party has acted in "bad faith," and on its

power under 42 U.S.C. §1988. The Eighth Circuit affirmed on statutory grounds, but recognized that the record amply supported an award based on the "bad faith" conduct of officials of the Arkansas Board of Correction, 548 F.2d at 742. E.g., Aleyeska, supra, 421 U.S. at 258. See also, Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 390 (1923). Sovereign immunity does not shield a state from the Federal imposition of litigation costs attributable to its "bad faith" conduct in failing to implement Federal court orders.

In general, the "bad faith" exception to the American rule on attorney's fees recognizes two categories of litigation expenses: "unavoidable" expenses generated by the operation of a complex dispute-resolution system, and "avoidable" expenses attributable not to the complexity of the dispute-resolution system, but to the unreasonable behavior of one of the litigants. Although American practice, in the absence of statute, burdens each party with its "unavoidable" litigation expenses, the "bad faith" exception permits an American court to charge against an unreasonable litigant the "avoidable" costs attributable to his or her conduct.

The District Court determined (and the Eighth Circuit agreed) that the behavior of the Arkansas Department of Correction had caused avoidable litigation costs; the Court therefore charged those avoidable costs to the entity whose unreasonable conduct had caused them.

Unreasonable state litigation is a burden not only on the parties but also on the limited resources of the Federal judiciary. When a state official fails to implement a lawful order of a Federal court, that failure jeopardizes not only the interests of the plaintiff, but also the interests of the United States in maintaining the integrity and supremacy of Federal court orders. And where, as here, the bad faith of a state agency impedes enforcement of a Federal court order, the court's decision to implement that order through allocation of attorney's fees against that state agency is justified by the same interest that authorizes suits by the United States against a state. E.g., United States v. Mississippi, 380 U.S. 128 (1965); Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974). See also, Rodriguez v. Swank, 496 F.2d 1110 (7th Cir. 1974) (Eleventh Amendment does not bar contempt sanctions to compel compliance with decrees); Class v. Norton, 505 F. 2d 123 (2d Cir. 1974) (same).

In "policing" the litigation process and imposing sanctions for its abuse, Federal courts act as agents of a superior sovereignty, to which the states ceded authority as a necessary consequence of joining the Federal union. Just as the United States Department of Labor may sue a state in Federal court to enforce Federal labor norms and just as the Attorney General of the United States may sue a state in Federal court to enforce voting norms, so a Federal District Court may impose sanctions on a state in the form of an award of attorney's fees to enforce standards of reasonable conduct occasioned by the state's bad faith failure to implement court orders.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

Dated: New York, New York
Dec. 29, 1977

Burt Neuborne
New York University School of law
Washington Square South
New York, New York

Richard Emery
New York Civil Liberties Union Foundation
84 Fifth Avenue
New York, NY 10011
212-924-7800

Bruce J. Ennis
American Civil Liberties Union Foundation
22 East 40th Street
New York, NY 10016
212-725-1222

Attorneys for Amici Curiae*

* Amici wish to acknowledge the substantial assistance of Charles S. Sims, a candidate for admission to the New York bar, in the research and preparation of this brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1660

TERRELL DON HUTTO, et al.,
Petitioners,
v.
ROBERT FINNEY, et al.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

ARMAND DERFNER
PAUL R. DIMOND
NORMAN REDLICH
Trustees

ROBERT A. MURPHY
NORMAN J. CHACHKIN
RICHARD S. KOHN
DAVID M. LIPMAN
WILLIAM E. CALDWELL
Staff Attorneys

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 - 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for *Amicus Curiae*

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership

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* The parties' letters of consent to the filing of this brief are being filed with the Clerk pursuant to Rule 42(2).

today includes two former Attorneys General, ten past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the Nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fourteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The primary objective of the Lawyers' Committee is to help develop the legal resources necessary to enforce the civil rights of minorities and poor people. Pursuant to that objective, we seek to enlist the services of the private bar in aid of the individual rights secured by the Constitution and federal civil rights laws. That effort, in our extensive experience, is heavily dependent upon the availability of court-awarded attorneys' fees to plaintiffs who successfully carry on litigation to enforce congressional civil rights policies. Statutory authorization for such awards is a familiar legislative mechanism for encouraging private enforcement of congressional policies. The correct interpretation and implementation of such legislation is critical to a substantial part of the Committee's work. Consequently, for several years we have operated an Attorneys' Fees Project as an adjunct to our substantive litigation activities. Through that project we have provided assistance to Congress in connection with its consideration and passage of civil rights attorneys' fees legislation,[1] and we have participated in litiga-

[1] For example, we presented testimony to Congress during its deliberations on, *inter alia*, the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559 (Oct. 19, 1976), 90 Stat. 2641, amending 42 U.S.C. § 1988.

tion involving the construction of such legislation.[2]

In the case at bar, plaintiffs-respondents, inmates of the Arkansas prison system, have invoked federal-court jurisdiction pursuant to 42 U.S.C. § 1983 and, after protracted litigation, have obtained declaratory and injunctive relief aimed at conforming the operation of the state's prisons to the individual-rights guarantees made applicable to the states by the Fourteenth Amendment to the federal Constitution. Pursuant to the "bad faith" exception to the "American rule" that each litigant must bear his own lawyers' fees, the district court awarded modest attorneys' fees to plaintiffs' counsel, with directions that the award be paid by defendants, officials of the Arkansas Department of Correction (petitioners here), in their official capacities, *i.e.*, out of Department of Correction funds. The Court of Apeals for the Eighth Circuit, primarily relying upon the Civil Rights Attorney's Fees Awards Act of 1976, codified as the last sentence of 42 U.S.C. § 1988, affirmed the district court's award of fees over petitioners' objections that the award is not authorized by § 1983 and is prohibited by the Eleventh Amendment and the principles of state sovereignty embodied therein. *Finney* v. *Hutto*, 548 F.2d 740 (8th Cir. 1977). Petitioners have brought those issues to this Court.

The Lawyers' Committee represents civil rights plaintiffs in a number of lower-court § 1983 cases which involve the same attorneys' fees/Eleventh Amendment issues,[3] and we have appeared as *amicus* in similar cases

[2] In addition to numerous cases in the courts of appeals, we have filed *amicus* briefs with this Court in *Christiansburg Garment Co.* v. *EEOC*, No. 76-1383 (pending); *Stanton* v. *Bond*, 429 U.S. 973 (1976); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974).

[3] *See, e.g., Gates* v. *Collier*, 559 F.2d 241 (5th Cir. 1977); *Wade* v. *Mississippi Cooperative Extension Service*, 424 F.Supp. 1242 (N.D. Miss. 1976).

in this Court.[4] We also have provided representation to litigants in this Court in § 1983 cases concerning the general reach of the Eleventh Amendment,[5] and we have filed *amicus* briefs in cases involving the scope of, and the relief available under, § 1983.[6] The Lawyers' Committee thus has vital interests at stake in this case.

It is our view that the correct and simple answer to this case is, as we argued in our *amicus* brief in *Stanton* v. *Bond*, *supra*, that the Eleventh Amendment is inapplicable to awards of attorneys' fees. Respondents' brief persuasively demonstrates the correctness of that view, and we do not principally concern ourselves herein with the arguments supporting that dispositive answer. Out of an abundance of caution, however, we assume *arguendo* that the Eleventh Amendment applies, as petitioners and their friends argue, and we address the issues raised by that assumption: whether the 1976 Fees Act or § 1983 itself overrides any sovereign immunity from fee awards which the states might have.

The Lawyers' Committee therefore files this brief as friend of the Court urging affirmance of the judgment below.[7]

SUMMARY OF ARGUMENT

I. In the 1976 Fees Act, Congress plainly intended to authorize awards to be paid out of state treasuries. Claiming its power from the Enforcement Clauses of the Thirteenth and Fourteenth Amendments, Congress expressed its will that fees be awarded despite conflicting

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[4] *Stanton* v. *Bond*, *supra*; *Fitzpatrick* v. *Bitzer*, *supra*.

[5] *See, e.g., Milliken* v. *Bradley*, —— U.S. —— (1977).

[6] *See, e.g., Monell* v. *Department of Social Services of the City of New York*, No. 75-1914 (pending).

[7] We do not address the issue on the substantive merits which petitioners have also presented for review.

assertions of state sovereignty. The Act is therefore sufficient to override the sovereign immunity of the states in § 1983/Fourteenth Amendment cases. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). There is no requirement that Congress, in stripping the states of their immunity, must use express statutory language, so long as the congressional intent is clear. *Employees of the Dept. of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279 (1973). In order to accomplish the result it desired, Congress was not required to amend § 1983 itself; the question here is one of permissible remedy, *Edelman* v. *Jordan*, 415 U.S. 651 (1974), which in this instance is explicitly governed by the Fees Act in accordance with the historical function of 42 U.S.C. § 1988. *See, e.g., Moor* v. *County of Alameda*, 411 U.S. 693 (1973). It also is irrelevant that the state is not a named party; the state officials who are petitioners *are* the state for Fourteenth Amendment purposes. *See, e.g., Cooper* v. *Aaron*, 358 U.S. 1, 15-17 (1968); *Ex parte Virginia*, 100 U.S. 339 (1880).

II. Wholly apart from the Fees Act, § 1983 itself overcomes sovereign-immunity defenses (and, consequently, fees may be awarded against states under both the Act and the "bad faith" standard) in suits to enforce the Fourteenth Amendment. As confirmed by the relevant decisions of this Court, *see, e.g., Mitchum* v. *Foster*, 407 U.S. 225 (1972), and by the legislative debates surrounding § 1983's enactment, notions of state sovereignty are completely incompatible with the basic thrust of § 1983. There is no evidence in the legislative history, including that pertaining to the "Sherman amendment" as construed in *Monroe* v. *Pape*, 365 U.S. 167 (1961), that Congress sought to exempt state treasuries from § 1983's reach. The question of the "person"hood of states and state agencies is, at the least, an open one in this Court. *Compare Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 452 (*dictum*), *with Sosna* v. *Iowa*, 419 U.S.

393 (1975). The correct answer is that they, as well as state officials sued in their official capaciites, are suable under, and their sovereign immunity is displaced by, § 1983, at least in suits to enforce the Fourteenth Amendment. *A fortiori*, attorneys' fees are allowable.

ARGUMENT

Introduction

In our *amicus* brief in *Stanton* v. *Bond*, 429 U.S. 973 (1976), we argued that the Eleventh Amendment does not apply to attorneys' fees awarded by the federal courts pursuant to the "bad faith" exception to the "American rule"—*i.e.*, "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .'"[8] Our argument there, which we deem dispositive, is that lawyers' fees, like costs, merely are one of the "incidents" of litigation for which states are liable "just as any other litigant. . .," *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 168 (1927); that fee awards are not in the nature of monetary relief, but have only that "ancillary effect on the state treasury [which] is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*, [209 U.S. 123 (1908), to which the Eleventh Amendment does not extend]." *Edelman* v. *Jordan*, 415 U.S. 651 (1974).[9] *See also Milliken* v. *Bradley*, —— U.S.

[8] *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-59 (1975), *quoting F. D. Rich Co., Inc.* v. *Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974); *see also Runyon* v. *McCrary*, 427 U.S. 160, 183-84 (1976).

[9] In *Edelman* the Court provided the following characterizations of the sort of monetary relief, even if equitable in nature, that falls without the sanction of *Ex parte Young*: "award of retroactive payments of the statutory benefits found to have been wrongfully withheld" (415 U.S. at 663); "award of an accrued monetary liability" (*id.* at 664); "payment of . . . money which . . . should have been paid, but was not" (*id.*); payment of " 'state funds to make

—— (1977). The argument has equal applicability to awards under the 1976 Fees Act, which authorizes fees to be assessed "as part of the costs." 42 U.S.C. § 1988. The Court should therefore adhere to its summary disposition of this issue in *Amos* v. *Sims*, 409 U.S. 942 (1972), *aff'g* 340 F.Supp. 691 (M.D. Ala.), as respondents' brief compellingly demonstrates.

If we and respondents are mistaken in our belief that Eleventh Amendment/sovereign immunity principles have no application to fee awards in *Ex parte Young* suits, we submit nonetheless that such immunity as the states may have has been displaced by Congress: first, by the Fees Act, and second, by § 1983 itself. Preliminarily, we observe that the Fees Act was passed in response to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).[10] It has the primary

reparation for the past' " (*id.* at 665); "retroactive payments" (*id.* at 666 n.11); "payment of state funds . . . as a form of compensation" (*id.* at 668); "in practical effect indistinguishable in many respects from an award of damages against the State" (*id.*); and an award "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Id.* An award of attorneys' fees ordinarily is none of these things. *See Bond* v. *Stanton*, 528 F.2d 688 (7th Cir.), *vacated*, 429 U.S. 973 (1976); *Thonen* v. *Jenkins*, 517 F.2d 3, 7-8 (4th Cir. 1975); *Souza* v. *Travisono*, 512 F.2d 1137 (1st Cir.), *vacated on other grounds*, 423 U.S. 809 (1975); *Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1974); *Boston Chapter NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Gates* v. *Collier*, 70 F.R.D. 341, 347-50 (N.D. Miss. 1976), *aff'd on other grounds*, 559 F.2d 241 (5th Cir. 1977); *Welsch* v. *Likins*, 68 F.R.D. 589 (D. Minn.), *aff'd and adopted*, 525 F.2d 987 (8th Cir. 1975); *Downs* v. *Department of Public Welfare*, 65 F.R.D. 557 (E.D. Pa. 1974); *cf. Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 58 (3d Cir. 1976) (*en banc*); *contra, Skehan* v. *Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975); *Jordon* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

[10] *See, e.g.*, SUBCOMM. ON CONST. RIGHTS OF SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUBLIC LAW 94-559, S.2278)—SOURCE

purpose of insuring access to the courts [11] in, *inter alia*, § 1983 cases against state agencies and officials.[12] We note also that Congress intended the Act to apply to

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BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 10 (Senate Report), 19-20 (remarks of Sen. Mathias), 21 (Sen. Kennedy), 75 (Sen. Hathaway), 138 (Sen. Tunney), 202 (Sen. Abourezk), 210 (House Report), 237 (remarks of Rep. Anderson of Illinois), 245 & 269 (Rep. Seiberling), 247 (Rep. Bolling), 252-53 (Rep. Drinan), 259 (Rep. Railsback), 263 (Rep. Kastenmeier), 264 (Rep. Fish), 267 (Rep. Holtzman) (Comm. Print 1976) [hereinafter, "LEG. HIST."].

LEG. HIST. includes all of the relevant legislative history of the Fees Act, including the floor debates of both the Senate (daily editions fo 122 CONG. REC., September 21-24, 27-29 1976) and the House (daily edition of 122 CONG. REC., October 1, 1976), and the respective reports of the Committees on the Judiciary of both the Senate (S. REP. No. 94-1011 (June 29, 1976) ("Senate Report")) and the House (H.R. REP. No. 94-1558 (Sept. 15, 1976) ("House Report")). The bill that became law was S.2278, which passed the Senate by a vote of 57 to 15 on September 29, 1976. LEG. HIST. 204. The Senate bill was then taken up in the House on October 1, 1976, pursuant to resolution (*id.* at 235, 248-52), where it passed on the same day by a vote of 306 to 68. *Id.* at 275-78. (President Ford approved the law on October 19, 1976.) The House Report pertains to H.R. 15460, a bill virtually identical to S.2278 (*see id.* at 213); the House Report on H.R. 15460 forms a significant part of the Fees Act's legislative history, and it was referred to throughout the debates in the House. *See id.* at 235 (remarks of Rep. Bolling), 236, 237 (Rep. Anderson of Illinois), 248 (Rep. Bauman), 252 (Rep. Drinan), 260 (Rep. Kastenmeier), 271 (Rep. Seiberling). The only substantive difference between H.R. 15460 and S.2278 as it passed the Senate was the omission in the House bill of the provision pertaining to actions brought by the United States under the Internal Revenue Code.

[11] *See, e.g.*, LEG. HIST. 8 & 11 (Senate Report), 19 (remarks of Sen. Hugh Scott), 19-20 (Sen. Mathias), 23 (Sen. Kennedy), 75 (Sen. Hathaway), 199-200 (Sen. Tunney), 202 (Sen. Abourezk), 209 (House Report), 245 (Rep. Seiberling), 263 & 264 (Rep. Kastenmeier), 267 (Rep. Holtzman), 268 (Rep. Jordan).

[12] *See, e.g.*, LEG. HIST. 4 & 5 (Senate Report), 77-79 (remarks of Sen. Helms), 201 (Sen. Kennedy), 213 & 215 (House Report), 253 (Rep. Drinan), 265 (Rep. Fish). In addition to the Court of Appeals for the Eighth Circuit in the judgment below, two other courts of appeals, the First and Fifth Circuits, have held the Fees Act applicable in the specific context of § 1983 litigation against state prison systems or penal institutions. *Gates* v. *Collier*, 559 F.2d 241 (5th Cir. 1977); *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977); *cf. Martinez Rodriguez* v. *Jimenez*, 551 F.2d 877 (1st Cir. 1977) (Commonwealth of Puerto Rico). *See also Guajardo* v. *Estelle*, 432 F. Supp. 1373 (S.D. Tex. 1977). In the non-prison context other courts have held the Act applicable to § 1983 suits against state-level officials. *See, e.g., Universal Amusement Co., Inc.* v. *Vance*, 559 F.2d 1286 (5th Cir. 1977); *Brown* v. *Culpepper*, 559 F.2d 274 (5th Cir. 1977); *Gay Lib* v. *University of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Bond* v. *Stanton*, 555 F.2d 172 (7th Cir. 1977); *Rainey* v. *Jackson State College*, 552 F.2d 672 (5th Cir. 1977); *Southeast Legal Defense Group* v. *Adams*, 436 F. Supp. 891 (D. Ore. 1977); *White* v. *Crowell*, 434 F. Supp. 1119 (W.D. Tenn. 1977) (three-judge court); *Schmidt* v. *Schubert*, 433 F. Supp. 1115 (E.D. Wis. 1977); *Maynard* v. *Wooley*, —— F. Supp. —— (D. N.H. 1977) (three-judge court); *Gary W.* v. *Louisiana*, 429 F. Supp. 711 (E.D. La. 1977); *Wade* v. *Mississippi Cooperative Extension Service*, 424 F. Supp. 1242 (N.D. Miss. 1977); *cf. Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977) (Commonwealth of Puerto Rico). For similar holdings against local governments and their officials, *see, e.g., Miller* v. *Carson*, 563 F.2d 741 (5th Cir. 1977); *Beazer* v. *New York City Transit Authority*, 558 F.2d 97 (2d Cir. 1977); *Franklin* v. *Shields*, —— F.2d —— (4th Cir. 1977); *Seals* v. *Quarterly County Court of Madison County*, 559 F.2d 1221 (6th Cir. 1977); *Planned Parenhood of Minnesota, Inc.* v. *Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977); *Reynolds* v. *Abbeville County School Dist.*, 554 F.2d 638 (4th Cir. 1977); *Stanford Daily* v. *Zurcher*, 550 F.2d 464 (9th Cir. 1977), *cert. granted*, —— U.S. —— (Oct. 3, 1977); *Bogart* v. *Unified School Dist. No. 298*, 432 F. Supp. 895 (D. Kan. 1977); *Commonwealth of Pennsylvania* v. *O'Neill*, 431 F. Supp. 700 (E.D. Pa. 1977); *Gambino* v. *Fairfax County School Dist.*, 429 F. Supp. 731 (E.D. Va. 1977); *Wilson* v. *Chancellor*, 425 F. Supp. 1227 (D. Ore. 1977).

pending cases,[13] and that the lower courts unanimously have discerned and followed this legislative intent.[14]

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[13] *See, e.g.*, LEG. HIST. 202-03 (Sen. Abourezk), 212 n.6 (House Report), 247 (Rep. Anderson), 255-56 (Rep. Drinan), 272-75 (motion by Rep. Ashbrook, to recommit the bill to add an amendment to "exempt from the coverage of this act all of those hundreds of cases which are pending right now," defeated). *See also Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974).

[14] In addition to the cases cited in note 12, *supra*, *see, e.g., Gore* v. *Turner*, 563 F.2d 159 (5th Cir. 1977); *Wharton* v. *Knefel*, 562 F.2d 550 (8th Cir. 1977); *Hodge* v. *Seiler*, 558 F.2d 284 (5th Cir. 1977). For similar holdings with respect to other recent fee provisions, *see, e.g., Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977); *Alphin* v. *Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, —— U.S.

The Fees Act, Pub. L. No. 94-559 (Oct. 19, 1976), 90 Stat. 2641, amends REV. STAT. § 722 (42 U.S.C. § 1988) by adding the following thereto:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985-1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 U.S.C. §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

I. IF THE ELEVENTH AMENDMENT IS APPLICABLE, ITS PROTECTIVE SHIELD HAS BEEN REMOVED BY CONGRESS EXERCISING, IN THE FEES ACT, THE POWERS CONFERRED BY § 5 OF THE FOURTEENTH AMENDMENT.

Petitioners, and the four states (hereinafter, "*amici*") which have filed *amicus* briefs supporting petitioners, argue that this case is not controlled by the "incident of litigation" holding of *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927), nor by the "ancillary effect" holdings of *Edelman* v. *Jordan*, 415 U.S. 662 (1974), and *Milliken* v. *Bradley*, —— U.S. —— (1977). Petitioners and *amici* do not view attorneys' fees as a subordinate aspect of a suit authorized by *Ex parte Young*, 290 U.S. 123 (1908). Instead, they see fees as a severable claim for monetary relief more akin to *Hans* v. *Louisiana*, 134

—— (1977); *Lytle* v. *Commissioners of Election of Union County*, 541 F.2d 421 (4th Cir. 1976); *Wallace* v. *House*, 538 F.2d 1138 (5th Cir. 1976).

U.S. 1 (1890), than to *Ex parte Young*. According to their argument, an award of attorneys' fees falls on the "retroactive monetary relief," rather than the "prospective relief," side of the line drawn in *Edelman* v. *Jordan*. Respondents' brief shows that this argument is not sustainable, and we agree with respondents. For purposes of this *amicus* brief, however, we assume *arguendo* the applicability of the Eleventh Amendment and the principles of sovereignty it expresses. On that assumption, the judgment below still must be affirmed, because the Fees Act is an exercise of plenary congressional power authorized by § 5 of the Fourteenth Amendment,[15] which necessarily limits any protection from federal judicial power that the Eleventh Amendment and sovereign-immunity principles might otherwise confer upon the states.

While petitioners and *amici* seem to agree that Congress intended the Fees Act to strip them of any claim of sovereign exemption, and that such a result, validly attained, would not be unconstitutional, they urge nevertheless that in several technical respects Congress has fallen short of its goal. Their principal arguments[16]

[15] In relevant part, §§ 1 and 5 of the Fourteenth Amendment provide as follows:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[16] Among the lesser arguments are some rather amorphous suggestions that fee awards against states run afoul of the Tenth Amendment and other principles of federalism (Miss. Br. 14-15; Penn. Br. 22-23; Calif. Br. 13-14), suggestions that are not made by petitioners. The Chief Justice addressed similar arguments, and rejected them out of hand, in last Term's *Milliken* v. *Bradley*, ——

are these: (1) that any congressional authorization for monetary relief against the states, to be valid and sufficient as against the state-sovereignty defense, must say on its face in so many statutory words that such relief may be awarded against the states (Pet. Br. 8-9; Miss. Br. 6-9; Calif. Br. 12-13; Iowa Br. 5; Penn. Br. 13-14); (2) that Congress may not authorize monetary relief against the states in § 1983 suits in any way other than by an amendment to § 1983 itself expressly defining

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U.S. ——, —— (1977), slip op. 23, a case that imposed on the state treasury for relief costing almost six million dollars. *See id.* at —— (Powell, J., concurring), slip op. 2. We also do not further address Mississippi's contention (Miss. Br. 13-14) that the Fees Act is invalid for want of due process because it "create[s] an irrebuttable presumption that a State is liable for a monetary judgment for attorney's fees whenever one of its officials is the losing party in an action brought under various Federal civil rights statutes." *Id.* at 13. Even if the states are entitled to due process, *but see South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966), there is no factual basis for Mississippi's argument.

In addition, California argues (Br. 13-15) that the Fees Act is not "appropriate legislation" within the contemplation of § 5 of the Fourteenth Amendment (*see* note 15, *supra*). The Act was enacted primarily because of Congress' judgment, in the words of the House Report, that "awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." LEG. HIST. 217. This hardly is an irrational judgment; indeed, the Court recognized its validity in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 264 (1975). Congress held hearings and engaged in extensive debate; it proceeded firmly yet with care; its response to *Alyeska* was one of dissatisfaction, yet it was a measured response, leaving much of *Alyeska* still intact (*i.e.*, in the non-civil rights public-interest field). Congress based its authority so to act upon, *inter alia*, § 5 of the Fourteenth Amendment. California's attack on that claim is foreclosed by *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *South Carolina* v. *Katzenbach*, *supra*; *Ex parte Virginia*, 100 U.S. 339 (1880). California's invitation to "reevaluate" *Fitzpatrick* (Br. 15) is also groundless. California, and also Iowa and Pennsylvania, would be better advised if they were taking the same position here that they took in *South Carolina* v. *Katzenbach*. *See* 383 U.S. at 307 n.2.

states as being among the "persons" suable thereunder (Pet. Br. 5, 7-9; Miss. Br. 5; Calif. Br. 10-11; Iowa Br. 4, 5-6; Penn Br. 5, 12, 14); and (3) that monetary relief to be satisfied out of state funds is impermissible unless the state is a named party to the lawsuit (Pet. Br. 2 (question presented); Miss. Br. 9-12).

A. The Fees Act Authorizes Fee Awards to Be Assessed Against Funds Belonging to the States, Notwithstanding Sovereign-Immunity Defenses.

It is not disputed that § 1983, along with its jurisdictional counterpart, 28 U.S.C. § 1343(3) (*see* note 27 *infra*), obliges the federal courts to entertain actions against state officials for alleged violations of rights secured by the Fourteenth Amendment. *See, e.g.*, *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Hagans* v. *Lavine*, 415 U.S. 528 (1974), and cases discussed at pp. 32-35, 51-53, *infra*; *cf. Philbrook* v. *Glodgett*, 421 U.S. 707 (1975) (federal statutory claim); *Edelman* v. *Jordan*, *supra* (same). There also can be no mistake that Congress intended fee awards in such cases ordinarily to be paid out of state funds.

On the floor of the Senate, Senator Helms proposed an amendment to the Act which he described as "affording] protection to financially pressed State and local governments by including them within the bill's exemption from liability granted to the Government of the United States." LEG. HIST. 77. Senator Helms' remarks warrant further quotation, because he specifically called the attention of his colleagues to the fact that the Act subjected state treasuries to liability for attorneys' fees (*id.* at 78-79):

> This legislation provides that State and local governments and their officials can be defendants in cases involving these statutes and that attorneys' fees will "be collected either directly from the official in

his official capacity, from funds of his agency or under his control, or from the State or local government." Presently this legislation potentially places a tremendous burden upon State and local governments. In other public interest law suits where the legal fees have been contested they have ranged from $200,000 to $800,000. Certainly, it is unwise to provide that liability in these amounts be assumed by already financially hard-pressed State and local governments.

Therefore, the amendment I am about to call up would exempt State and local governments.

The Helms amendment (*id.* at 81) was rejected (*id.* at 83-84), as was a similar amendment proposed by Senator Allen. *Id.* at 146, 150-51; *cf. id.* at 181-82 (defeated amendment of Sen. William L. Scott). The Senate entertained no doubts about its power to reach state and local government treasuries, obviously sharing Senator Abourezk's view, expressed just before passage, that "[i]n enacting this legislation we are acting pursuant to section 2 of the 13th Amendment and section 5 of the 14th amendment." *Id.* at 203.

The Senate Report also makes clear Congress' desire to override any efforts to defeat fee awards with claims of state sovereignty. The Report cites *Fairmont Creamery*, LEG. HIST. 11n.6, and it contains the following unequivocal assertion of congressional power over the states (*id.* at 11) (footnotes omitted):[17]

> In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced. We find that the effects of such

[17] The Senate Report is dated June 29, 1976; it was prepared without the benefit of this Court's decision of the day before in *Fitzpatrick* v. *Bitzer*, *supra*. The second sentence in the quotation in text, as California and Pennsylvania suggest (Calif. Br. 12; Penn. Br. 8), indicates that the Senate Report "couched its rationale in terms adopted from *Edelman* v. *Jordan*, *supra*."

> fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

Similarly, the House Report (dated September 15, 1976), in a footnote appended to the statement that "[t]he greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities," LEG. HIST. 215, cites *Fitzpatrick* v. *Bitzer*, *supra*, and says: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments." *Id.* at 215 n.14.[18] Similar views were expressed during debate in the House. Representative Drinan, a floor manager of the bill, said that "any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants." LEG. HIST. 255. His relevant remarks in full are (*id.*):

[18] Referring to both the Senate Report (*see* note 17, *supra*) and the House Report, California and Pennsylvania make an elaborate argument to the effect that Congress misconstrued this Court's decisions in *Edelman* and *Fitzpatrick*. Calif. Br. 10-13; Penn. Br. 5-9. Although they are wrong, the point we are making here is not that Congress was correct in its understanding of Eleventh Amendment law, but rather that Congress intended to do all that was necessary to supersede any sovereign immunity that the states might otherwise enjoy.

> The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th amendment. That amendment limits the power of the Federal courts to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick against Bitzer. Since this bill is enacted pursuant to the power of Congress under section 2 of the 13th amendment and section 5 of the 14th amendment, any question arising unde rthe 11th amendment is resolved in favor of awarding fees against State defendants.

Congress plainly intended to overcome any sovereign-immunity defense that might be deemed applicable to fee awards.

B. In Order Validly to Override the Sovereign Immunity of the States Congress Is Not Limited to Express Statutory Language, So Long as the Intent Is Clear.

Notwithstanding the clarity of the legislative will, petitioners and their supporting *amici* claim that Congress committed several critical technical mistakes. One of these alleged technical flaws is the failure of the Fees Act to strip the states of their immunity *in haec verba*. Their argument, in effect, is that Congress should have added these or similar words to the language of the Act: "any claim of state sovereignty or Eleventh Amendment immunity to the contrary notwithstanding."

Strange as the argument is the supporting citation to *Employees of the Dept. of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279 (1973). Mississippi's argument on this point is typical. Citing *Employees*,[19] the state's brief says (p. 6):

[19] In addition to *Employees*, petitioners and *amici* cite a single district court opinion in further support of the proposition in question: *Skehan* v. *Board of Trustees of Bloomsburg State College*, 436 F. Supp. 657 (M.D. Pa. 1977) (alternative holding). This decision relies solely on *Employees*, and it is not persuasive for reasons discussed in text.

> This Court has stated with clarity that courts can look only to the plain, unambiguous and explicit language embodied in a statute enacted by Congress in determining whether Congress has authorized a State to be sued in a particular case.

The holding in *Employees* simply will not bear this interpretation. In fact, *Employees* demonstrates that the congressional intent necessary to overcome the sovereign-immunity defense may be derived from legislative history and other indicia of intent, as well as from the statutory language.

In making its determination in *Employees* that "Congress was silent as to waiver of sovereign immunity of the States," 411 U.S. 286, the Court there said (*id.* at 285) (emphasis added):

> But we have found not a word *in the history of the 1966 amendments* to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts. . . . It would also be surprising in the present case *to infer* that Congress deprived Missouri of her constitutional immunity without changing the old § 16 (b) under which she could not be sued *or indicating in some way* by clear language that the constitutional immunity was swept away.

The italicized portions of the above-quoted language show that the Court did not restrict Congress' legislative prerogatives in the way that petitioners and *amici* contend.

In any event, the Fees Act contains the express statutory override that petitioners and *amici* argue is needed. It explicitly authorizes fees in § 1983 litigation against a background of reported decisions of this Court and the

lower federal courts revealing a multitude of § 1983 cases in which relief has been granted against state officials in their official capacities. In this circumstance, an express statutory authorization to award attorneys' fees in such suits constitutes an explicit refutation of any sovereign-immunity defense. The Fees Act on its face thus precludes the assertions of sovereign exemption made in this case. Congress has done all that reasonably is necessary, and all that the judicial department reasonably ought to require, to achieve the end which all agree it strove to reach.

C. Congress Ws Not Required to Amend § 1983 in Order to Authorize Fee Awards in § 1983 Suits Against State Officials.

The next alleged technical flaw discovered by petitioners and *amici* is the failure of Congress to amend the "person" definition of § 1983 to give express authorization for § 1983 suits against states as such. The argument seems to be that although the federal courts, acting under § 1983 as it now reads, may order state officials in their official capacities to provide relief costing the states millions of dollars, *see, e.g., Milliken* v. *Bradley* (*Milliken II*), *supra*, Congress cannot, by simple statutory authorization, empower these same courts to award attorneys' fees in such cases. Rather, to accomplish that result Congress must amend § 1983's grant of federal-court jurisdiction [20] and explicitly sanction suits against the states as states. The proposition that states *qua* states are not suable under § 1983 relies on *dictum*

[20] Section 1983's "person" limitation is held to be one of subject-matter jurisdiction. *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973); *see also Aldinger* v. *Howard*, 427 U.S. 1, 16-17 (1976); *cf. Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278-79 (1977) (*dictum*).

in *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 452. *But cf. Sosna* v. *Iowa*, 419 U.S. 393 (1975).[21]

The fundamental error in the states' argument is its treatment of the availability of attorneys' fees under the Eleventh Amendment as a question of subject-matter jurisdiction, or one of authorized cause of action, or both. It is neither, as demonstrated by *Edelman* v. *Jordan*, *supra*, a § 1983 case involving a claim for relief based on the Social Security Act.[22] In *Edelman* the Court held that the district court properly entertained the suit under the doctrine of *Ex parte Young*, but that the Eleventh Amendment "constitute[d] a bar to that portion of the District Court decree which ordered retroactive payment of benefits found to have been wrongfully withheld." 415 U.S. at 678. The evident reason for this conclusion is that the Court could find no specific congressional authorization for the retroactive monetary *relief* which the district court had ordered. The Court noted that "the Social Security Act itself does not create a private cause of action," *id.* at 674, although the Court also acknowledged that "suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States."

[21] In the next Argument we show that there is no basis in § 1983's legislative history or in this Court's decisions for conferring upon states and state agencies the exclusion from § 1983's coverage which the Court has found available to municipalities; nor, in view of § 1983's co-extensive relationship with the Fourteenth Amendment, is there any valid basis for a "prospective relief" limitation on the remedy available in § 1983/Fourteenth Amendment suits against official-capacity state defendants. Here we simply show that there is no need in this case to reach that broader issue.

[22] This case, in contrast, is based on the Fourteenth Amendment. As we point out in the next Argument (*see* pp. 51-53, *infra*), that distinction is critical, for a result different from *Edelman* obtains when the § 1983 case involves a claim under one of the Civil War Amendments which "supersedes contrary exertions of state power." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325 (1966). *See also Fitzpatrick* v. *Bitzer*, *supra*.

Id. at 675. There then follows this critical language (*id.* at 675-77) (emphasis added):

> But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, *a federal court's remedial power*, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young*, *supra*, and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury*, *supra*.

Thus, *Edelman* held that the Eleventh Amendment bar had not been overcome because there was no specific congressional remedial authorization for relief beyond that sanctioned by *Ex parte Young* (to which the Eleventh Amendment is not applicable). In the instant case, a similar analysis leads to a different result with respect to the question of attorneys' fees. Here as in *Edelman*, the injunctive relief ordered by the district court is excluded from the Eleventh Amendment prohibition by the doctrine of *Ex parte Young*. But here, in contrast to *Edelman*, the Fees Act provides the specific legislative authority for the monetary award at issue. And the Act, it will be remembered, amended 42 U.S.C. § 1988,[23] whose historical function has been to instruct

[23] The relationship between § 1983 and the Fees Act (amending § 1988) is not accidental. Section 1988 derives from § 3 of the Civil Rights Act of April 9, 1866, 14 Stat. 27. The entire 1866 Act was re-enacted, following passage of the Fourteenth Amendment, by § 18 of the Enforcement Act of May 31, 1870, 16 Stat. 140. When § 1983 was passed a year later, it specifically incorporated the remedial-law provisions of the 1866 Act. *See* § 1 of the 1871 Act, quoted in note 27, *infra*. Codification in 1874 resulted in § 1988's ancestor becoming REV. STAT. § 722, which was made applicable to

federal courts as to the scope and kinds of remedies to be afforded in, *inter alia*, § 1983/Fourteenth Amendment cases. *See, e.g.*, *Moor* v. *County of Alameda*, 411 U.S. 693 (1973).

In sum, the issue in this case is whether the particular remedy (attorneys' fees), manifestly authorized by Congress, is available in light of the Eleventh Amendment. The answer to this question in no way implicates an extension of the cause of action or of the district court's

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the civil-rights civil and criminal provisions of the Revised Statutes, including the provision now codified as § 1983. *See Moor* v. *County of Alameda*, 411 U.S. 693, 704-05 & nn. 18 & 19 (1973). As now codified in Title 42 of the United States Code, § 1988 (without the Fees Act) provides as follows (with only technical differences from the language of the Revised Statutes, owing to differences in the organization of the two codes):

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Section 1988 has been judicially construed as being "intended to complement the various [civil rights] acts," *Moor* v. *County of Alameda*, *supra*, 411 U.S. at 702, by directing application of the remedial rule that "better serves the policies expressed in [such acts]." *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240 (1969). Prior to the Fees Act, however, it was held that § 1988, in the absence of one of the historical equitable exceptions to the "American rule" recognized in *Alyeska*, did not authorize an award of attorneys' fees to prevailing civil-rights litigants. *Runyon* v. *McCrary*, 427 U.S. 160, 184-86 (1976).

subject-matter jurisdiction, the validity of both being conceded and otherwise not disputable. The fees award is specifically authorized by the Fees Act, which to that extent displaces any protection that the Eleventh Amendment would otherwise give the states. Whether a general damages remedy is available against the states under § 1983, and whether the states are suable under § 1983 for such relief, are questions which are not pertinent to the narrow issue before the Court.

D. It Also Is Irrelevant That the State Is Not a Named Party.

In the statement of their first question presented, petitioners seem to take issue with the fact that the fee award assertedly was made against the state, "which was not a party to the suit." Pet. Br. at 2. (In the court below petitioners apparently questioned the absence of the Department of Correction as a named party, *see* 548 F.2d at 742 (Pet. App. 5).) Petitioners do not return to this question, but Mississippi takes it from there and argues that Arkansas is an "absent indispensable party to this action." Miss. Br. 9-12. Mississippi relies upon decisions of this Court which are not in point,[24] and FED. R. CIV. P. 19.

There is no possible merit to this "absent party" argument, which contradicts the established rule that the

[24] Mississippi cites the following cases: *Durfee* v. *Duke*, 375 U.S. 106, 115 (1963); *Arkansas* v. *Tennessee*, 246 U.S. 158, 176 (1918); *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961); *Christian* v. *Atlantic & N.C. R.R.*, 133 U.S. 233 (1890); and *Belknap* v. *Shild*, 161 U.S. 11, 18 (1896). The passages in *Christian* and *Belknap* relied upon by Mississippi are no more than statements that the precise circumstances covered by the Eleventh Amendment (diversity suits against states) may not be circumvented merely by suing state officers for the same relief. The language relied upon from the other cases is also inapposite, because in each instance it pertains to a situation where a state is not present or represented in any fashion by a party in a suit affecting the state's concrete interests.

Eleventh Amendment may come into play "even though the State is not named a party to the action." *Edelman*, *supra*, 415 U.S. at 663; *see also*, *e.g.*, *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945).[25] More fundamentally, the argument misapprehends the nature of states *vis-a-vis* the Fourteenth Amendment and the Amendment's understanding of the manner in which states act. As the first Mr. Justice Harlan put it in *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226, 233-34 (1896), *citing, inter alia, Ex parte Virginia*, 100 U.S. 339, 346, 347 (1880):

> But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, "violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state." This must be so, or, as we have often said, the constitutional prohibition has no meaning, and "the state has clothed one of its agents with power to annul or evade it."

See also United States v. *Reese*, 92 U.S. 214, 249-52 (1876) (Hunt, J., dissenting). This Court specifically

[25] Mississippi's argument, therefore, runs counter to the settled principle that the Eleventh Amendment's applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record." *Ex parte New York*, 256 U.S. 490, 500 (1921). On another occasion, Mississippi has argued that it could not be made a party in a voting-rights case brought by the United States under 42 U.S.C. § 1971, because "the Fifteenth Amendment 'is directed to persons through whom a state may act and not to the sovereign entity of the state itself.'" *United States* v. *Mississippi*, 380 U.S. 128, 138 (1965). The Court was unanimously unimpressed with that position; Mississippi's *amicus* argument in this case merits a similar fate.

bound the State of Arkansas to that understanding in the historic nine-Justice opinion in *Cooper* v. *Aaron*, 358 U.S. 1, 15-17 (1958), and the question is not open for debate.

In this case Arkansas prison officials, including petitioners here, acting "in the name and for the state," have operated a system of prisons in violation of the Fourteenth Amendment. From that "point of view . . . they stand in this litigation as the agents of the State." *Id.* at 16. In the Fees Act, by authorizing fees to be paid out of relevant state or state-agency funds, Congress has done no more than adhere to the straightforward scheme of the Fourteenth Amendment. Conceivably, there could be actions in which relief is sought against a state without its knowledge or participation, and which therefore should be disallowed (*cf.* note 24, *supra*), but this is not such a case. This is the precise case contemplated by both Congress and the Fourteenth Amendment.

II. SECTION 1983 ITSELF PROVIDES FOR MONETARY AWARDS AGAINST STATES AND THEIR AGENCIES AND OFFICIALS; IT IS AN EXERCISE OF CONGRESSIONAL POWER AUTHORIZED BY THE FOURTEENTH AMENDMENT; THE ELEVENTH AMENDMENT IS EITHER INAPPLICABLE TO OR SUPPLANTED BY § 1983/FOURTEENTH AMENDMENT SUITS.

Section 1983, like the Fees Act and like the provisions of Title VII considered in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), is an exercise by Congress of the plenary power conferred by § 5 of the Fourteenth Amendment (*see* note 15, *supra*) which necessarily limits the sovereign immunity of the states. Petitioners and *amici* are wrong in their view that § 1983 must be amended in order for it to authorize monetary relief against state-owned funds; without regard to the Fees Act, the courts below possessed ample authority under § 1983 to award fees against petitioners under the "bad faith" exception—again, assuming

arguendo the applicability of the Eleventh Amendment to such awards of attorneys' fees. Before addressing the principal § 1983 question, we reiterate, by brief summary, the broader and more fundamental view of the Eleventh Amendment's scope which we advanced as friend of the Court in *Fitzpatrick* v. *Bitzer*, *supra*.

A. The Eleventh Amendment Is Not Applicable To Federal-Question Suits Against The States.

In our brief in *Fitzpatrick* v. *Bitzer*, *supra*, we argued that, as a threshold matter, the reach of the Eleventh Amendment does not extend to federal-question claims against the states. *See* Brief for the Lawyers' Committee for Civil Rights Under Law, et al., As *Amici Curiae*, in No. 75-251, at pp. 10-28. We adhere to that view and continue to urge it as a correct interpretation of Eleventh Amendment/sovereign immunity principles. Briefly summarized, the argument is that the Eleventh Amendment was designed to restore the Framers' original understanding of Article III's diversity clause as not conferring federal judicial power over *state-law* claims against unconsenting states—the understanding expressed by Alexander Hamilton in THE FEDERALIST NOS. 32 & 81, and by Justice Iredell in his dissent in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793)—*not* to withdraw federal judicial power with respect to *federal-question* claims against the states. That original understanding was correctly construed in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), but it was misapprehended in *Hans* v. *Louisiana*, 134 U.S. 1 (1890), which is the source of all of the modern confusion about the meaning of the Eleventh Amendment and the principle of state sovereignty embodied therein.

In *Fitzpatrick* the Court did not, and did not need to, reach the above argument. Instead, the Court rested its decision on the narrower ground that Congress is empowered by the Fourteenth Amendment, whose "substan-

tive provisions . . . themselves embody significant limitations on state authority" (427 U.S. at 456), to subject the states (there through Title VII) to the full remedial powers of the federal courts. A similar Fourteenth Amendment ground of decision is available in this case.

B. In § 1983/Fourteenth Amendment Suits, the States Are Divested of Sovereign-Immunity Defenses.

1. *The historic significance of § 1983 and the relevant decisions of this Court.*

As the Court reconfirmed in *Fitzpatrick* v. *Bitzer*, the very words of the Fourteenth Amendment preclude a construction of the Amendment's guarantees which would subordinate them in any way to pre-Amendment notions of state sovereignty.[26] It would be surprising to learn that § 1983's ancestor, the Civil Rights Act of 1871—entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," 17 Stat. 13, and passed but three years after the Amendment's ratification—did not manifest similar antipathy toward the claimed sovereignty of the states. Section 1 of the Act (from which § 1983 specifically derives), conferred federal-court jurisdiction over law and equity actions arising under the Fourteenth Amendment.[27] Sections 2 and 6 of the Act

[26] Proof that the Fourteenth Amendment displaced, and was intended to displace, claims of sovereign right on the part of the states—*i.e.*, that the Amendment "involves a corresponding diminution of the governmental powers of the States[; i]t is carved out of them," *Ex parte Virginia*, 100 U.S. 339, 346 (1880)—is fully detailed in the Brief for the United States As Amicus Curiae in Nos. 75-251 & 75-283, *Fitzpatrick* v. *Bitzer*, and in the Brief *Amicus Curiae* of the NAACP Legal Defense and Educational Fund, Inc., in No. 72-1410, *Edelman* v. *Jordan*.

[27] As passed, § 1 of the Act of April 20, 1871, 17 Stat. 13, read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

In 1874 Congress separately codified the cause-of-action and jurisdictional parts of § 1, the former becoming REV. STAT. § 1979 and the latter being divided into two sections: REV. STAT. § 563(12) (district courts) and § 629(16) (circuit courts). The cause-of-action part now appears as 42 U.S.C. § 1983 (although Title 42 of the United States Code has not been enacted into positive law, the language of § 1983 is identical to that appearing in the Revised Statutes (§ 1979)):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdictional provisions is now 28 U.S.C. § 1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

The evolution process is informatively traced in *Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974) (Russell, J.). The only significant change in wording from the original 1871 Act appears in connection with the addition in 1874 of the words "and laws," so that § 1983 author-

contained comprehensive civil and criminal prohibitions against civil rights conspiracies, §§ 3 and 4 gave the President ultimate discretion to intervene into state affairs with armed force and to suspend the writ of habeas corpus, and § 5 prescribed a detailed loyalty oath for jurors in federal court. All engendered heated debate.[28]

The 1871 Act was the first extensive legislation enacted by Congress pursuant to § 5 of the Fourteenth Amendment, which had been adopted in 1868.[29] Not surprisingly,

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izes redress for "the deprivation of rights, privileges, or immunities secured by the Constitution *and laws* . . . ." (Emphasis added). *See Hagans* v. *Lavine*, 415 U.S. 528, 533 n.5 (1974); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972). Also, the phrase "equal rights" as a limitation in § 1343(3) appeared for the first time in the 1874 grant of circuit-court jurisdiction (REV. STAT. § 629(16)), though not in the cause-of-action (§ 1979) and district-court jurisdiction (§ 563(12)) authorizations. Of these language changes, the Court has said: "Despite the different wording of the substantive and jurisdictional provisions, when the § 1983 claim alleges constitutional violations, § 1343(3) provides jurisdiction and both sections are construed identically." *Id.* at 544 n.7, *citing Douglas* v. *City of Jeannette*, 319 U.S. 157, 161 (1943).

[28] The Court has noted that § 1 of the Act was not the most hotly contested feature of the bill. *See Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 164-65 (1970); *Monroe* v. *Pape*, 365 U.S. 167, 181 (1961). Section 1 hardly went unnoticed, however. While some of the opponents of other sections of the bill did not oppose § 1 (*see, e.g.*, GLOBE 419 (Rep. Bright)), others did express strenuous opposition to § 1's transfer of jurisdiction over constitutional causes of action from the state courts to the federal courts, as will be discussed at greater length in text. *See id.* at app. 50 (Rep. Kerr), 337 (Rep. Whitthorne), 352, 353 (Rep. Beck), 361 (Rep. Swann), app. 86 (Rep. Storm), 395 (Rep. Rice), 416 (Rep. Biggs), app. 91-92 (Rep. Duke), app. 258 (Rep. Holman), app. 179-80 (Rep. Voorhees), app. 215 (Sen. Johnston), app. 241, 243 (Sen. Bayard), app. 216-17 (Sen. Thurman), 645 (Sen. Davis). ["GLOBE" refers to CONG. GLOBE, 42d Cong., 1st Sess. (1871). The presence of "app." indicates that the page reference is to the "Appendix" to the *Congressional Globe* for that session of Congress, rather than to the main part.]

[29] Two civil rights acts—the Enforcement Act of May 31, 1870, 16 Stat. 140, and the Force Act of February 28, 1871, 16 Stat. 433—

much of the 1871 congressional debate echoed that of 1868, when the Amendment itself had been debated by the First Session of the Thirty-Ninth Congress prior to its submission to the people. In support of the 1871 Act, Representative Bingham (whom Justice Black has called "the Madison of the first section of the Fourteenth Amendment"[30]) reiterated the views he had expressed in 1866 (*cf.* CONG. GLOBE, 39th Cong., 1st Sess. 1088-90, 2542-43 (1866)) as he stated the convictions of the Republican majority of the Reconstruction Congress (GLOBE app. 85):[31]

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intervened between adoption of the Fourteenth Amendment and enactment of § 1983. Both of these intervening acts primarily were to enforce the voting guarantees of the Fifteenth Amendment, although § 18 of the 1870 Act re-enacted (pursuant to the Fourteenth Amendment) the 1866 Civil Rights Act, *see Runyon* v. *McCrary*, 427 U.S. 160, 168 n.8 (1976), in order to resolve all doubts about the earlier Act's validity under the Thirteenth Amendment. *See Hague* v. *C.I.O.*, 307 U.S. 496, 509-10 (1939).

[30] *Adamson* v. *California*, 332 U.S. 46, 74 (1947) (dissenting opinion). Bingham was a member of the Joint Committee on Reconstruction which drafted the Fourteenth Amendment. Bingham had drafted an earlier version, introduced in each House of Congress on February 13, 1866, which merely empowered Congress to enact laws protecting civil rights (including "equal protection"). This proposal contained no substantive guarantees. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866). This initial proposal ran into trouble, and the Joint Committee was forced to reconvene. At this time Bingham drafted the language which ultimately became the second sentence of § 1 of the Fourteenth Amendment. Approved by the Joint Committee on April 28, this revised draft "marked a real advance upon earlier proposals. This was no longer a mere grant of power to Congress, but a self-executing positive provision barring the states from restricting civil rights." 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES; CIVIL RIGHTS 215 (1970). "It converted the Fourteenth Amendment from a grant authorizing Congress to protect civil rights to a self-operating prohibition which could be enforced by the courts though there had been no congressional action in the matter." *Id.* at 293.

[31] *See also, e.g.*, GLOBE 339 (Rep. Kelley), 428-29 (Rep. Beatty), 448 (Rep. Butler), 459 (Rep. Coburn), 487-88 (Rep. Lansing), app. 202 (Rep. Snyder), app. 187 (Rep. Willard), 651 (Senator Sumner).

The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizens had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?

In opposition, Representative Arthur, with specific reference to § 1 of the Act, decried on behalf of the Democrat minority that Congress was running roughshod over the states (GLOBE 365):[22]

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[22] *See also, e.g.*, GLOBE 366 (Rep. Arthur); 338 (Rep. Whitthorne), 373 (Rep. Archer), app. 87 (Rep. Storm), 378 (Rep. Shober), app. 206-09 (Rep. Blair), 416 (Rep. Biggs), app. 89-90 (Rep. Duke), 454 (Rep. Cox), app. 260 (Rep. Holman), app. 148 (Rep. Lanison), 599-600 (Rep. Saulsbury), app. 241 (Rep. Bayard). The remarks just referred to and others like them reveal that the Democrats, although they were in a minority, were well-schooled in the art of advocating the sovereignty of the states. As Justice Frankfurter has noted, many of the men who comprised the Congress during these days were notably competent lawyers. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 366-67 & n.22 (1959). It therefore is of particular interest that the Democrats in 1871, despite their capable advocacy of the "rights" of the states, did not place any reliance on the Eleventh Amendment. They researched the decisions of this Court, they traced the sovereignty of the states back to the Articles of Confederation, they quoted the Constitution's guarantee (Art. IV, § 4) to the states of a republican form of government, they examined THE FEDERALIST and the debates of the Constitutional Convention, they repeatedly relied upon the Tenth Amendment—yet we have found only one oblique reference (GLOBE app. 160 (Rep. Galloday)) in the entire 1871 debates to the Eleventh Amendment. This significant omission reinforces our view (subsection IIA, *supra*) that the Eleventh Amendment was never intended to apply to federal-question disputes.

> It overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions and offices of the States, and then asserts over them an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof. Having done this, having swallowed up the States and their institutions, tribunals, and functions, it leaves them the shadow of what they once were. They are nominally what they should be as of sovereign right. And so long as they remain servile, appliant, and subservient, the mailed hand of central power is stayed. But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, they are liable, and most certain, at the suit of any knave, plain or colored, under the pretext of the deprivation of his rights, privileges and immunities as acitizen, par excellence, of the United States, to be summarily stripped of official authority, dragged to the bar of a distant and unfriendly court, and there placed in the pilory of vexatious, expensive, and protracted litigation, and heavy damages and amercements, destructive of health and exhaustive of means, for the benefit of unscrupulous adventurers or venal minions of power.

This Court has recalled that "[a] pervasive sense of nationalism led to enactment of the Civil Rights Act of 1871. . . ." *Steffel* v. *Thompson*, 415 U.S. 452, 463 (1974). *See also Zwickler* v. *Koota*, 389 U.S. 241, 246-47 (1967). As described in F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 64 (1928):

> Sensitiveness to "states' rights", fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War. Nationalism was triumphant; in national administration was sought its vindication. The new exertions of federal power were no longer trusted to the enforcement of state agencies.

Section 1 of the 1871 Act, now § 1983, clearly was one of these "new exertions of federal power." This particular exercise took the form of a jurisdictional grant to the federal courts, giving them authority to entertain Fourteenth Amendment causes of action.[32] "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardian of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum*

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[32] As mentioned previously (*see* note 28, *supra*, and pp. 34-35, *infra*), the opponents of § 1 of the 1871 Act focused their complaints on the jurisdictional transfer to the federal courts. For the same reason, the Act received the support of other members of Congress (*see also* pp. 46-48, *infra*): "Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." GLOBE 376 (Rep. Lowe). "We believe that we can trust our United States courts, and we propose to do so." *Id.* at 460 (Rep. Coburn). *See also id.* at 476 (Rep. Dawes). And Senator Pool said (*id.* at 609):

> I yet hope it is possible to escape more violent means by a prompt resort to the ordinary Federal tribunals of justice. Unless that resort be promptly and efficiently taken there is no hope of escaping for another year the application of the most stringent and ruinous military measures.

v. *Foster*, 407 U.S. 225, 242 (1972), *quoting Ex parte Virginia*, *supra*, 100 U.S. at 346. As the Court explained in *District of Columbia* v. *Carter*, 409 U.S. 418, 427 (1973):

> To the Reconstruction Congress, the need for some form of federal intervention was clear. It was equally clear, however, that Congress had neither the means nor the authority to exert any direct control, on a day-to-day basis, over the actions of state officials. The solution chosen was to involve the federal judiciary.

"During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws." *Zwickler* v. *Koota*, *supra*, 389 U.S. at 245. But "[w]ith the growing awareness that this reliance had been misplaced,[34] . . . Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials." *District of Columbia* v. *Carter*, *supra*, 409 U.S. at 428.

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

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[34] As the Court documented in *Mitchum* v. *Foster*, 407 U.S. at 240-42, the state courts were deemed by the Congress of 1871 to have defaulted in their obligations to enforce the Fourteenth Amendment. "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute [Act of March 2, 1793, 1 Stat. 335] was enacted." *Id.* at 242.

Monroe v. *Pape*, 365 U.S. 167, 180 (1961); *see also id.* at 193 (Harlan, J., concurring). As summarized in *Mitchum* v. *Foster*, *supra*, 407 U.S. at 242:

> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Elsewhere we have detailed the legislative history showing that Congress' purpose in § 1983 was to establish a federal-court action for relief as broad as the Fourteenth Amendment would allow.[35] Typical of that history is Senator Thurman's unavailing complaint that "there is no limitation whatsoever upon the terms that are employed [in § 1983], and they are as comprehensive as can be used." GLOBE app. 217. He said (*id.* at app. 216):

> This section relates wholly to civil suits. It creates no new cause of action. Its whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy . . . . I am certainly not in favor of denying to any man who is deprived unlawfully of his right, his

[35] *See* Brief for National Education Association and Lawyers Committee for Civil Rights Under Law, as Amici Curiae, in No. 75-1914, *Monell* v. *Department of Social Services of City of New York* (argued November 2, 1977), at pp. 5a-13a [hereinafter "*Monell Amici* Br."].

> privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated; but I do think that it is a most impolitic provision, that in effect may transfer the hearing of all such cases into the Federal courts.

In the light of the foregoing, it is not possible, as petitioners and *amici* in the case at bar seem to contend, that this Congress of 1871, acting for the express purpose of enforcing the Fourteenth Amendment (which specifically speaks to states) and in the face of opposition charges that the sovereignty of the states was being eroded, intended § 1983's grant of an "action at law [and] suit in equity" to be circumscribed by the sovereign-immunity claims of the most likely types of § 1983 defendants, state agencies and officials. Nor is it conceivable that this Congress in this statute—deemed to be "an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment," *Mitchum* v. *Foster*, *supra*, 407 U.S. at 238—intended a federal court to stop short of affording complete justice when it encountered a defense of state sovereign immunity.

2. *The language and legislative history of § 1983.*

The position of petitioners and *amici* warrants repetition of that part of § 1983's original language (*see* note 27, *supra*) providing that the constitutional wrongdoer, acting "under color of any law, statute, ordinance, regulation, custom, or usage of any State . . . shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured. . . ." The italicized phrase was not placed in the 1874 recodification (REV. STAT. § 1979), probably because the revisers thought it was surplusage. The phrase serves to demonstrate, however, that Congress did not intend unconstitutional state action of any kind

to be beyond the reach of the statute. Consistent with this plain language, the Court's decisions quoted above (and the legislative history there referred to) make it abundantly clear that "state officials," "state instrumentalities" and "state agencies" were § 1983's principal targets.

Petitioners and *amici* rely, however, on § 1983's asserted "person" limitation with respect to those who are made suable in federal courts. A state, they say, is not a "person" subject to § 1983 federal judicial power; therefore, a § 1983 suit which seeks money (even an award of attorneys' fees) payable out of state funds is to that extent a suit against a non-"person," even though the "prospective relief" aspects of the action are proper. This conclusion is not based on anything in the legislative history of § 1983 relating to the definition of "person." Indeed, it is not even based on legislative history pertaining to the suability of states. The argument rests, rather, on an inference drawn from this Court's holding in *Monroe* v. *Pape*, 365 U.S. 167, 187-92 (1961), that municipalities are not § 1983 "persons." That decision, in turn, was based on an inference drawn from the fate of the so-called "Sherman amendment" which would have amended the 1871 Act by making municipalities absolutely liable, without fault, for riot damages occurring within their jurisdiction.[36] Regardless of the correctness of the *Monroe* interpretation, the added inference sought by petitioners and *amici* simply is not supportable.

If we could ask the Congressmen of 1871 whether they intended states as such to be made suable under § 1983 as named party defendants—a question which the lower courts periodically feel constrained to raise and answer [37]

[36] *See Monell Amici* Br. 17a-19a, nn. 47 & 51.

[37] *See, e.g., Rochester* v. *White*, 503 F.2d 263 (3d Cir. 1974), and Third Circuit cases cited *id.* at 266 n.6; *Cheramie* v. *Tucker*, 493 F.2d 586 (5th Cir.), *cert. denied*, 419 U.S. 868 (1974); *Collins*

—the answer probably would be that the question misses the point, because it was assumed by all that the Four-

v. *Moore*, 441 F.2d 550 (5th Cir. 1971); *Zuckerman* v. *Appellate Division*, 421 F.2d 625 (2d Cir. 1970); *Diamond* v. *Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Deane Hill Country Club, Inc.* v. *City of Knoxville*, 379 F.2d 321 (6th Cir.), *cert. denied*, 389 U.S. 975 (1967); *Williford* v. *California*, 352 F.2d 474 (9th Cir. 1965); *United States ex rel. Lee* v. *Illinois*, 343 F.2d 120 (7th Cir. 1965); *Gras* v. *Stevens*, 415 F. Supp. 1148 (S.D. N.Y. 1976) (three-judge court). This reasoning has been extended also to state agencies and other state-level instrumentalities. *See, e.g., Huntley* v. *North Carolina State Bd. of Educ.*, 493 F.2d 1016, 1017 n.2 (4th Cir. 1974) (state board of education); *Curtis* v. *Everette*, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (state bureau of corrections); *Allison* v. *California Adult Authority*, 419 F.2d 822 (9th Cir.), *cert. denied*, 394 U.S. 966 (1969) (state adult authority and state department of corrections); *Cheramie* v. *Tucker*, *supra* (state highway department); *Zuckerman* v. *Appellate Division*, 421 F.2d 625 (2d Cir. 1970) (state courts); *Coopersmith* v. *Supreme Court of Colorado*, 465 F.2d 993 (10th Cir. 1972) (same); *Moity* v. *Louisiana State Bar Ass'n*, 414 F. Supp. 180 (E.D. La. 1976) (same); *Protrollo* v. *University of South Dakota*, 507 F.2d 775, 777 n.1 (8th Cir. 1974), *cert. denied*, 421 U.S. 952 (1975) (state university and its board of regents); *Blanton* v. *State University of New York*, 489 F.2d 377 (2d Cir. 1973) (same); *cf. Gay Students Organization* v. *Bonner*, 509 F.2d 652 (1st Cir. 1974); *Coopersmith* v. *Supreme Court of Colorado*, 465 F.2d 993 (10th Cir. 1972) (state bar association); *Clark* v. *Washington*, 366 F.2d 678 (9th Cir. 1966) (same); *cf. Moity* v. *Louisiana State Bar Ass'n*, *supra*; *Sherman* v. *Dellums*, 417 F. Supp. 7 (C.D. Calif. 1973) (state fair employment practices commission). *Contra, Forman* v. *Community Services, Inc.*, 500 F.2d 1246 (2d Cir. 1974), *rev'd on other grounds sub nom. United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975) (state housing finance agency); *Stebbins* v. *Weaver*, 396 F. Supp. 104 (W.D. Wis. 1975); *Marin* v. *University of Puerto Rico*, 377 F. Supp. 613 (D. P.R. 1974). None of the above non-"person" decisions were based on analysis of the legislative history of § 1983. Rather, their uniform rationale is the superficial one that if the "political subdivisions of a state, *i.e.*, municipalities and counties . . . were not 'persons' under § 1983, the state itself was obviously not such a 'person' and therefore, the entities through which the state functions should be excluded." *Adkins* v. *Duval County School Board*, 511 F.2d 690, 693 (5th Cir. 1975). Aside from the fact that the logic of this analysis ultimately reduces § 1983 to a virtually meaningless statute, we show below (pp. 48-53, *infra*) that, despite their superficial appeal, these decisions are completely mistaken.

teenth Amendment empowered Congress to bring the states, as states and in their legislative capacities, to heel. The issue mooted in the debates, rather, was: how much farther than that may Congress go? How far down into the states and their functions may Congress reach? We of course know the answer to be that whoever acts for the state, even the lowliest of the state's local functionaries, is subject to the Fourteenth Amendment and to congressional action thereunder: "Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Ex parte Virginia*, *supra*, 100 U.S. at 347. That is the answer given in 1880 to the question Congress debated in 1871. Examination of that debate is informative with respect to the controversy at hand.

One of the recurring objections to the 1871 Act was the contention that the Fourteenth Amendment operated against the states only with respect to discriminatory legislation; that the Amendment, in the words of one opponent, is "prohibitory only on the legislation of the States." GLOBE 455 (Rep. Cox). This position accordingly held that Congress' authority to enforce the Fourteenth Amendment did not extend to forms of state action other than to discriminatory or otherwise unlawful legislation. *See, e.g., id.* at 420 (Rep. Bright), 429 (Rep. McHenry), 600 (Sen. Saulsbury), 661 (Sen. Vickers), app. 160 (Rep. Golladay), app. 208-09 (Rep. Blair of Missouri), app. 231 (Sen. Blair), app. 259 (Rep. Holman). Representative of this point of view are the remarks of Senator Thurman, leader of the opposition in the Senate (app. 221):

> And so, too, in regard to the limitation upon the power of the States that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The language of the Constitution is that the State shall not do it; and what is the State? The State is a word used with several significations. It may sometimes be used, and frequently is used, in a geographical sense, to mean the territory. At other times it is used to describe the whole collective body of the people; but in its political significance it is used in the sense in which it is here used, to signify the government of the State. It is not simply some judge sitting in Alamance county; he is not the State of North Carolina; much less some constable or sheriff in Caswell county. The State of North Carolina, in this sense, is that political autonomy which makes the government, and it is the denial by that government, and not by some individual, although he is clothed with a commission, that constitutes a denial by the State.
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> Would it be said to be a denial by the United States of any right if some district judge in Kansas or Florida should make a decision that really infringed the rights of an individual? Would it be said that the Government was guilty of a denial of right in that case, when that very man would, if his motive was corrupt, be impeached before this Senate and convicted and turned out of office by this very Government?
>
> When, therefore, it is said that no State shall deny the equal protection of the laws, the natural meaning of it is that no State shall make laws which deny equal protection to all the people who are residing in it, and that is the only safe meaning to give it; because otherwise you would blot the States out of existence by the broad construction that has been contended for.

The proponents of the legislation flatly rejected this view of the Fourteenth Amendment. Throughout the de-

bates they focused on the conduct of state officials and state institutions and other instrumentalities of state government. "The laws must not only be equal on their face," said Representative (later President) Garfield, "but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State." GLOBE app. 153. Clearly it was with the administration of state laws that they were most concerned. *See also, e.g.*, GLOBE 321 (Rep. Stoughton), 334-35 (Rep. Hoar), 375 (Rep. Lowe), 394 (Rep. Rainey), 426 (Rep. McKee), 429 (Rep. Beatty), 444-45 (Rep. Butler), 459 (Rep. Coburn), 482 (Rep. Wilson of Indiana), 607-08 (Sen. Pool), 696-97 (Sen. Edmunds), app. 72 (Rep. Blair of Michigan), app. 80 (Rep. Perry), app. 147 (Rep. Shanks), app. 152-53 (Rep. Garfield), app. 182 (Rep. Mercur), app. 185-86 (Rep. Platt), app. 300 (Rep. Stevenson), app. 309-10 (Rep. Maynard), app. 314-15 (Rep. Burchard). Speaking specifically to the argument that the Fourteenth Amendment is addressed only to state legislation, Representative Lowe said (GLOBE 375):

> I understand the argument to be that inasmuch as the alleged lawless acts sought to be corrected by the bill are not done in pursuance of any law or act of the States, that as there is no State authority or laws impeding the citizens in the enjoyment of their rights, the section [§ 1 of the Fourteenth Amendment] quoted does not apply. It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect. They have certain ends to accomplish, and must be understood as tending to accomplish the objects sought. What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a State? If a State has no law upon its statute book obnoxious to objection under the article referred to, but nevertheless permits

> the rights of citizens to be systematically trampled upon without color of law, of what avail is the Constitution to the citizen?
>
> The argument leads to the deduction that while the first section of the amendment prohibits all deprivation of rights by means of State laws, yet all rights may be subverted and denied, without color of law, and the Federal Government have no power to interfere. All you have to do, therefore, under this view, to drive every obnoxious man from a State, or slay him with impunity, is to have the law all right on the statute-book, but quietly permit rapine and violence to take their way, without the hinderance of local authorities. Such a position, Mr. Speaker, defeats itself by its own absurdities. The rights and privileges of citizens are not only not to be denied by a State but they are not to be deprived of them.

And Representative Wilson of Indiana made similar comments (*id.* at 482):

> But it must be observed, and I think it is conclusive against any such construction, that this language cannot fairly or reasonably be construed to refer exclusively to denial by statutory enactment. If such had been the meaning the language would have been "no law shall be enacted," or "no Legislature shall enact," &c., indicating in explicit terms that it was a statutory denial that was meant.
>
> But the language is "no State shall deny." What is meant by the word "State?" Obviously the word is used in its largest and most comprehensive sense. It means the government of the State. What is a State in its true sense? It is a government, not a mere legislative body empowered to enact laws; it is a trinity: the legislative, the judicial, and the executive: these three are one, the State. It requires the combination and cooperation of these three coordinate branches to make the State Government; and when the word "State" is used in this article it is in this triune sense, and its constitutional provi-

> sion means that this trinity shall not deny, &c. Now, if the legislative branch enacts and the judicial and executive fail or refuse to perform their respective parts, does not the State "deny?" If the Legislature provides penalties, and the judiciary refuses to adjudge them or is unable to do so, has not the State denied to the citizen who is the victim of the violation of the legislative act the equal protection of the laws?

In his speech closing debate in the Senate, Senator Edmunds, manager of the bill, spoke at length on the point in question (*id.* at 696):

> There is a direct prohibition to the State; it is a direct prohibition against the making of a law; it is a direct prohibition against the enforcing of a law; and that perhaps brings me to the question here as well as anywhere else, what is a State?
>
> My honorable friend from Ohio [Mr. THURMAN] said yesterday, my friend from New Jersey [Mr. STOCKTON] said the other day, and everybody says on that side, that a State is the legislative department, and that all the prohibitions and commonds of this section [§ 1 of the Fourteenth Amendment] are addressed to the law-making power of a State, and that any omission of the Governor to give rights under his department, any omission of the judiciary to grant rights under their department, any violation by either of these departments of a State government of any right secured by this section, is not a violation by the State, for that must be by the law-making power. Now, apply it to this:
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."
>
> Not "abridge the privileges and immunities of citizens of one State going to another," as the old language was, but "which shall abridge the privileges

> and immunities of citizens of the United States," whether they are citizens of one State or another—absolute and complete. But what is the State? Is it the Legislature? It is as to making law, with the aid of a Governor. As to enforcing a law, is the Legislature the State? How do Legislatures enforce laws? I had been taught in my little reading and experience in the profession of the law that the enforcement of the law belonged to the judiciary and the executive combined. I had never heard before that it was a part of the legislative functions of a government to enforce laws; and yet, if my friend is right, although the very word "enforce" is used in this prohibition, it is after all only a command to the members of the Legislature that they shall not enforce any such law; and therefore the executive and the judicial departments of the State are not prohibited from enforcing any law they please which violates the privileges and immunities of citizens of the United States.
>
> Why, Mr. President, this is absurd; it flies in the face of the very language, it flies in the face of everything we know of the nature and constitution of a government, be it State or national.

A few minutes later, Senator Edmunds returned to the question and made these additional comments (*id.* at 697):

> "No State is to deny," say the gentlemen. That means, they say, the State in its collective capacity. What part of the State? My friend from Ohio says the Legislature. Then the Legislature, reading it in that way, shall not deny to any person within its jurisdiction the equal protection of the laws. It had said that before. The very second provision in this section declares that no State shall make or enforce any law which shall interfere with the privilege and immunity of a citizen of the United States; and everybody agrees that that privilege and that immunity is the very same thing that is mentioned in other lan-

guage in the next clause—the privilege of life, the privilege of liberty, the privilege of the acquirement of property. So that, on the theory of my friend from Ohio, a great constitutional amendment, carefully prepared, discussed in both branches of Congress, passed by two thirds of each House, ratified by three fourths of the States, committed the awkward blunder of stating over again, in obscure language, what it had stated in its second provision only four lines above in clear language: that it had said that no State (which can only act through its Legislature) shall make any law which shall do this thing, and when it had, then, coming to the last clause, had restated the same thing in vaguer language, that they should not deny to any person the equal protection of the law. That cannot be maintained. A Legislature acting directly does not afford to any person the protection of the law; it makes the law under which and through which, being executed by the functionaries appointed by the State for that purpose, citizens receive the protection of the law.

But they say this is merely a prohibitory section, a mere denial of the right of a State to interfere with life, liberty, and property, and to prevent due redress. What is a denial, Mr. President? Is it merely a refusal in the sense of a man's appealing to the Legislature for a law and being told that he cannot have it; or what is it? It is a security to the citizen that he shall have the protection of law. Although the word is negative in form, it is affirmative in its nature and character. It grants an absolute right, and let me tell my honorable friends who deny it that it is not a chance word; it has been heard of in the law before; it has a history connected with human liberty ever since in Anglo-Saxon races human liberty and human rights have existed. The very word has come down from the earliest constitutions, from the very earliest written constitution of civilized liberty, to us as a word of art which carries in it an

obligation of a supreme and universal affirmation—a character which makes it the duty of every court and every government over every people which are entitled to its protection to see that they have it.

Now let us see. Here is the ancient charter of liberty which the bold barons, as you know, our English ancestors, wrested from King John; the rich and perpetual product, like our own amendments, of a great struggle for liberty; and in it are contained, in order to grant to the citizen this very protection, and in order to secure to him the duty of all the courts of all England to give it, as they have done, these very words: *"Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam."*

"We will sell to no man, we will not deny or defer to any man either right or justice."

Under that, not by force of parliamentary legislation, but as giving ever-affirmative rights, performing an affirmative duty, the first slave that set his foot on English soil was set free, because the courts could not deny to him that justice which that charter said should not be denied. And under it, as I have said, in every civilized State, comprising all the States of our nation, and comprising that great commonwealth, or kingdom as I ought strictly to say, from which we derived our law and our history for eight hundred years, until now it is questioned for the first time, it has been the recognized and bounden duty of all courts, and of all executive officers intrusted with the administration of justice and the law, to give that which the citizen was entitled to, to execute justice and afford protection against all forms of wrong and oppression. Why, sir, it has blazed on the forehead of constitutional liberty from that day to this. And yet, now being adopted as the greatest security settled through the course of centuries as a protecting, as an affirmative right in the citizen—those interests of liberty and property and life to which he is en-

titled—now for the first time it is attempted to be frittered away by the statement that it is a mere negative declaration, a kind of admonitory prohibition to a State, and that Congress is to invade the rights of the States and the liberties of the people when, these rights being denied, when criminals go unpunished by the score, by the hundred, and by the thousand, when justice sits silent in her temple in the States, or is driven from it altogether, it interposes in their behalf; when the Government of the whole people, through their laws and tribunals, takes in its hand this ancient monument and guarantee of justice now found in its Constitution and applies it as it always has been applied. Why, sir, if I were in any other place I should say—

"O Shame, where is thy blush?"

3. ***The Fourteenth Amendment-enforcement function of § 1983 is inconsistent with sovereign-immunity defenses.***

Thus, while no one disputed that the Fourteenth Amendment placed restrictions on states *qua* states, or states in their legislative capacities, the controversy was over the Amendment's coverage of other forms of state action, particularly the administration and implementation of state laws. Congress' power to subject the states as such to suits in federal court was never put in doubt. It is this fact that makes it inconceivable that the same Congress, without saying so, meant to exempt the states in any of their manifestations from § 1983's coverage. Adding to this unlikelihood is the clear evidence that § 1983's primary function was to transfer jurisdiction over Fourteenth Amendment cases into the federal courts. The opponents of § 1983 argued that there was neither need nor propriety for additional legislation, because the Fourteenth Amendment could be enforced in the state courts, as could the Contract Clause of the original Constitution, for example, with the federal remedy being already provided in the form of § 25 of the Judiciary Act of 1789, 1 Stat. 85, authorizing review by this Court of state-court dispositions of federal constitutional questions.[35] While § 1983's sponsors did not deny this point,

[35] The remarks of Representative Storm, specifically objecting to § 1 of the Act (§ 1983), are exemplary (GLOBE app. 86):

> But I object to this clause because it subjects suitors to delay. It does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning.
>
> Now these questions could all be tried, I take it, in the State courts, and by a writ of error, as provided by the twenty-fifth section of the act of 1789, could be brought before the Supreme Court for review. That act, in its twenty-fifth section, provides that whenever the State courts draw in question any statute or authority of the United States, and the decision is against their validity, or where is drawn in question the validity of a statute or authority exercised under any State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision is in favor of their validity, the final judgment or decree of said court may be reexamined, reversed, or affirmed in the Supreme Court of the United States on a writ of error. But the first section of this bill does not allow that right. It takes the whole question away at once and forever; and I say that on the ground of delay it is objectionable. It subjects suitors who are seeking the enforcement of their rights to great additional expense. For, in many of these cases, the places of the sitting of the circuit courts and of the district courts are hundreds of miles from places where these cases might arise.

Almost 100 years later, in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), involving the validity, under § 2 (the Enforcement Clause) of the Fifteenth Amendment, of the Voting Rights Act of 1965, South Carolina argued to this Court a point similar to that pressed by Representative Storm in the quotation above. Relying on the fact that § 1 of the Fifteenth Amendment "has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice" (*id.* at 325), South Carolina argued that only "the judiciary [is authorized] to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob

as far as it went (*see, e.g.*, GLOBE 577-79 (dialogue of Senators Carpenter, Trumbull, Thurman and Edmunds)),[39] they were of the firm view, as we have seen (pp. 32-34, *supra*), that the lower levels of the federal judiciary needed to be brought into the service of the Fourteenth Amendment. That was § 1983's purpose. It is a purpose irreconcilable with the position of petitioners and *amici* that less than a full measure of relief is available when money belonging to the state is implicated in a § 1983 suit.

4. *The "Sherman amendment" debates are essentially irrelevant.*

To the extent that the lower courts have relied on the "person" holding of *Monroe* v. *Pape* to circumscribe the scope of relief available under § 1983 against states and state agencies (*see* note 37, *supra*), the courts are in error. The *Monroe* "person" holding—that municipalities, counties and parishes are not subject to suit pursuant to § 1983—is based exclusively on the defeat of the proposed Sherman amendment (and a revised version), which would have added a section to the 1871 Act making cities and the like absolutely liable (even if they were not at fault) for personal injuries and property damages resulting from riots within their borders. Whether the fate of the Sherman amendment is viewed as a product of "serious legislative concern as to Congress' constitutional power to impose liability on political subdivisions

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the courts of their rightful constitutional role." *Id.* The Court rejected the argument, holding that, "in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Id.* at 326; *see also id.* at 327.

[39] The proponents agreed, for example, that the Contract Clause could be enforced against the States by the federal courts without any legislation from Congress other than a grant of jurisdiction—a point that had been settled since Chief Justice Marshall's opinion in *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819).

of the States" which also applies to § 1983, *Moor* v. *County of Alameda*, 411 U.S. 693, 708 (1973), or whether that fate is seen (as we view it) as a result of other concerns,[40] the Sherman amendment debates lend no support to the argument that state treasuries are protected from § 1983's reach. If the debates surrounding the Sherman proposal's defeat (coming after the Act, including § 1983, already had safely passed both the House and the Senate), are relevant in any way, it is because they demonstrate a contrary proposition.

The House Republicans responsible for the defeat of the Sherman amendment (*see* note 40, *supra*) uniformly expressed their opposition in terms peculiar to municipalities, but not to states. That is, their objections all were directed to the fact that municipalities have only such law-enforcement duties as the states choose to impose upon them. Nothing in the Fourteenth Amendment, in their view, authorized Congress to impose policing obligations upon cities, that being an exclusive prerogative of the States unaffected by the Amendment. Since there was no power to impose the policing duty, these Congressmen concluded that Congress necessarily lacked the power to subject municipalities to liability for the wrongs

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[40] In our view, the defeat of the Sherman amendment is not relevant to the scope of § 1983, which had already passed both Houses of Congress. But even assuming the relevance of the Sherman-amendment debates, we have pointed out (*see Monell Amici* Br. 17a-31a) that the defeat of that amendment is due entirely to the views of a handful of House Republicans who supported all of the provisions of the bill as it initially passed the House, but who "defected" with respect to the amendment added in the Senate at the behest of Senator Sherman. It is therefore the views of these defecting Republicans, rather than those of the House Democrats who opposed the bill in its entirety, which provide the correct understanding of the reasons for the defeat of the Sherman proposal. The *Monell amici* brief also shows that the failure of the Sherman proposal was not based on any doubts about Congress' power under the Fourteenth Amendment to subject municipalities to liability *for their own constitutional misconduct*.

of private citizens as proposed by the Sherman amendment. In other words, Congress could not impose a liability where it lacked the authority to impose a duty the breach of which was prerequisite to liability."[41]

This rationale is wholly incompatible with the notion that these same Congressmen doubted their authority to subject *states* to similar liability. It is problematic how they would have voted if someone had proposed to subject the *states* to liability without fault for riot damages. But surely they would not have questioned their power under the Fourteenth Amendment to impose both the duty and the liability upon the states as such. Representative Willard, one of the "defecting" Republicans (*see* note 40, *supra*), said as much (GLOBE 791):

> I hold that this duty of protection, if it rests anywhere, rests on the State, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State.

There is no basis in the Sherman amendment debates or any other part of the 1871 Act's legislative history for imputing to Congress a desire to protect state treasuries from the consequences of federal § 1983/Fourteenth Amendment suits against state agencies and officials—suits which Congress manifestly intended to authorize.

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[41] *See* GLOBE 791 (Rep. Willard), 794 (Rep. Poland), 795 (Rep. Blair of Michigan), 795 (Rep. Burchard), 798 (Rep. Bingham), 798-99 (Rep. Farnsworth). *See generally Monell Amici* Br. 17a-31a.

5. *The § 1983 status of states and their subordinate units is, at the very least, an open question in this Court.*

Petitioners and *amici* urge that the following dictum in *Fitzpatrick* v. *Bitzer* decides the issue in their favor (427 U.S. at 452):

> We concluded that none of the statutes relied upon by plaintiffs in *Edelman* contained any authorization by Congress to join a State as defendant. The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe* v. *Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant.

We submit that this language is not dispositive of the question, first, because it is *obiter dictum*, and second, because, to the extent that it relies on the "person" interpretation of *Monroe* v. *Pape*, it is erroneous, as we have shown above. We seek here only to demonstrate that the question is an open one in this Court. If it is, then it should be answered in accordance with the analysis set forth in the preceding part of this Argument.

Because of the *Fitzpatrick dictum* quoted above, the appropriate starting point is the 1974 decision in *Edelman* v. *Jordan*. (We have found no decision of this Court prior to that time which questions the § 1983 "person"-hood of states and state agencies.[42]) Despite the suggestion in *Fitzpatrick* that *Edelman's* § 1983 holding relied upon *Monroe* v. *Pape*, we are unable to understand *Edel-*

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[42] Section 1983 has formed the jurisdictional predicate for many of this Court's landmark Fourteenth Amendment rulings in federal-court suits against states, state instrumentalities, and state officials. *See, e.g., McLaurin* v. *Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971).

man (which does not even cite *Monroe*) in *Monroe* "person" terms. In Argument I, pp. 19-20, *supra*, we have quoted in full the *Edelman* § 1983 holding, which we interpret as being based on the fact that the Social Security Act—the source of the substantive rights involved there—did not authorize retroactive monetary relief against the states and, moreover, did not otherwise purport to override the sovereign immunity of the states.[42] A different result necessarily obtains when the § 1983 suit is one to enforce the Fourteenth Amendment, whose "substantive provisions . . . themselves embody significant limitations on state authority." *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 456.

We are further fortified in our interpretation of *Edelman* by the fact that the very next Term the Court decided the merits of a § 1983/Fourteenth Amendment case in which a state was a named party defendant, without questioning § 1983 subject-matter jurisdiction over the state. *Sosna* v. *Iowa*, 419 U.S. 393 (1975). *Sosna* cannot be viewed as a case in which jurisdiction was assumed without consideration. First, the Court specifically addressed the applicability of the Eleventh Amendment, cited *Edelman*, and concluded that the State of Iowa had validly waived the sovereign-immunity defense. *Id.* at 396 n.2. Second, the Court specifically examined the district court's subject-matter jurisdiction, concluding that "[s]ince jurisdiction was predicated on 28 U.S.C. § 1343(3), this case presents no problem of

[42] The *Fitzpatrick* explanation for *Edelman*'s handling of § 1983 is made more difficult to comprehend by reason of the Court's own treatment of the § 1983 "person" problem as a mandatory jurisdictional inquiry. *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). If the basis of the decision in *Edelman* truly was a determination that the suit against the official-capacity state official was in fact a suit against the state which "could not have been intended" by § 1983 to be a suable party, then the Court was without jurisdiction to render its decision on the Eleventh Amendment issue and should have vacated and remanded as in *City of Kenosha* v. *Bruno*, *supra*.

aggregation of claims in an attempt to satisfy the requisite amount in controversy of 28 U.S.C. § 1331(a)." *Id.* at 397 n.4. At the very least, *Sosna* must mean that the question of the suability of states under § 1983 is an open one.

6. *In any event, state officials are § 1983 "persons" for all purposes.*

In all events, the suability of state officials under § 1983 is firmly established. The status of such officials as § 1983 "persons" does not change when they are sued in their official capacities for monetary relief to be paid out of state funds: "the generic word 'person' in § 1983 was [not] intended to have a bifurcated application . . . depending on the nature of the relief sought. . . ." *City of Kenosha* v. *Bruno*, 412 U.S. 507, 513 (1973). There may be a basis for holding, as *Edelman* v. *Jordan* did, that suits against state officials to enforce federal statutory rights through § 1983 (*see* note 27, *supra*) do not overcome the Eleventh Amendment hurdle, unless the relevant federal substantive statute (in *Edelman*, the Social Security Act) portends that result. But there is no basis for allowing the Eleventh Amendment to be interposed as a barrier to complete relief in a § 1983 suit to enforce the Fourteenth Amendment, which of its own force limits the authority of the states. *Fitzpatrick* v. *Bitzer*, *supra*, 427 U.S. at 453-56.

Accordingly, there is no sovereign exemption from monetary relief in a § 1983/Fourteenth Amendment suit against states, state agencies or state officials. Subsumed within that conclusion is the *a fortiori* proposition that awards of attorneys' fees in such suits are not barred.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

CHARLES A. BANE
THOMAS D. BARR
Co-Chairmen

ARMAND DERFNER
PAUL R. DIMOND
NORMAN REDLICH
Trustees

ROBERT A. MURPHY
NORMAN J. CHACHKIN
RICHARD S. KOHN
DAVID M. LIPMAN
WILLIAM E. CALDWELL
Staff Attorneys

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 - 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for *Amicus Curiae*

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1660

TERRELL DON HUTTO, SUB NOM. JAMES MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION; MARSHALL N. RUSH, CHAIRMAN, ARKANSAS BOARD OF CORRECTION; EULA DORSEY, VICE-CHAIRMAN, ARKANSAS BOARD OF CORRECTION; THOMAS H. WORTHAM, M.D., SECRETARY, ARKANSAS BOARD OF CORRECTION; RICHARD E. GRIFFIN, MEMBER, ARKANSAS BOARD OF CORRECTION; AND JOHN ELROD, MEMBER, ARKANSAS BOARD OF CORRECTION,

Petitioners,

vs.

ROBERT FINNEY, ET AL.,

Respondents.

BRIEF OF THE STATE OF MISSISSIPPI, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

A. F. SUMMER
Attorney General of the State of Mississippi

P. ROGER GOOGE, JR.
Assistant Attorney General of Mississippi

PETER M. STOCKETT, JR.
Assistant Attorney General of Mississippi

Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 354-7130

Attorneys for Amicus Curiae, State of Mississippi

E. L. MERIDIONALE, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-5020

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INTEREST OF AMICUS CURIAE

The United States District Court for the Northern District of Mississippi and the Court of Appeals for the Fifth Circuit have entered orders or judgments holding

that plaintiffs in civil rights actions are entitled to monetary awards for attorney's fees from funds of the State of Mississippi on the basis of the provisions of P.L. 94-559, the Civil Rights Attorney's Fees Award Act of 1976, despite the State's immunity to suit or monetary judgment provided by the Eleventh Amendment to the *Constitution of the United States*.[1] In addition, there are a number of other cases in which prevailing plaintiffs in civil rights actions have motions pending for the awarding of attorney's fees against State funds on the basis of P.L. 94-559. Resolution of the questions of whether P.L. 94-559 authorizes the awarding of attorney fees to be paid by a State, which was not a party to the suit, and of whether the Eleventh Amendment to the *Constitution* absolutely bars the award of attorney fees to be paid by a State, which are two of the questions presented by this appeal, is, therefore, of significant interest to amicus.

SUMMARY OF ARGUMENT

P.L. 94-559, the Civil Rights Attorney's Fees Award Act of 1976, hereinafter sometimes referred to as "the Act" does not amend the definition of a "person" as used in the context of 42 U.S.C. § 1983 to include or encompass a State; nor does it by its terms establish jurisdiction for

1. *Gates* v. *Collier*, 70 F.R.D. 341 (D.C., N.D. Miss., 1976), *aff.*, 559 F.2d 241 (5th Cir., 1977), petition for rehearing *en banc* pending disposition of this case, $47,750.00; *Norwood* v. *Harrison*, 410 F.Supp. 133 (D.C., N.D. Miss., 1976), pending on appeal to the Court of Appeals for the Fifth Circuit, No. 76-1865, $23,852.00; *Rainey* v. *Jackson State College*, 551 F.2d 672 (5th Cir., 1977), petition for rehearing *en banc* pending, $11,182.50; and *Stevenson* v. *Reed*, ... F.Supp. ..... (D.C., N.D. Miss., No. GC 73-76-K, July 6, 1977), on appeal to the Court of Appeals for the Fifth Circuit, No. 77-2791, $4,925.00.

the joinder of a State as a party to any proceeding commenced, maintained, or prosecuted pursuant to it. Each of these factors, separately and independently, requires a holding that the Act does not authorize the awarding of attorney fees to be paid by the State of Arkansas in this case.

The failure of the Act to amend 42 U.S.C. § 1983 so as to make the State a suable entity thereunder demonstrates a lack of "threshold . . . congressional authorization" to allow a State to be sued as a defendant, which this Court held to be a prerequisite to the obtaining of a monetary judgment against a State in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452. The requisite "congressional authorization" to sue a State cannot be gleaned or inferred from the legislative history of the Act, but can only be shown by explicit, unambiguous statutory language incorporated within it.

The failure of the Act by its terms to vest jurisdiction in the Courts of the United States to join a State as a party defendant in a proceeding commenced, maintained, or prosecuted pursuant to it has the inevitable consequence of making the State of Arkansas an absent indespensable party defendant to this proceeding, which, if affirmed by this Court, would result in the entry of a monetary judgment to be paid by the State. If the Act should be construed so as to legislatively deem that Arkansas is not an indispensable party to a proceeding which would result in the rendition of a monetary judgment against it, then the Act would be void as an invasion of the Judiciary Power vested in the Courts of the United States by Article III of the *Constitution of the United States*, and of the rights reserved to Arkansas by the Tenth Amendment to the *Constitution of the United States*.

ARGUMENT

I

The Civil Rights Attorney's Fees Award Act of 1976 Does Not Operate to Abrogate the Immunity of the State of Arkansas in This Case

The Eleventh Amendment of the *Constitution of the United States* provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Although the Eleventh Amendment does not specifically prohibit the exercise of federal jurisdiction in a suit brought against an unconsenting State by one of its own citizens, this Court has held that the Amendment does prohibit federal jurisdiction in such cases. *Hans* v. *Louisiana*, 134 U.S. 1. The opinion of the Eighth Circuit from which this appeal is taken[2] held that the enactment by Congress of the Act abrogated the Eleventh Amendment immunity of Arkansas.

It is clear from a reading of the Act and an understanding of the exacting standards which this Court has established in order to effect abrogation of a State's immunity that the decision of the Eighth Circuit is erroneous and should be reversed.

P.L. 94-559 provides:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

2. *Hutto* v. *Finney*, 548 F.2d 740.

The basis upon which Respondents were the prevailing parties in the district court and the Court of Appeals for the Eighth Circuit, was a determination by those Courts that Petitioners had deprived Respondents of rights guaranteed by the provisions of 42 U.S.C. § 1983. This Court has held that States or municipalities are not "persons" within the context of § 1983 and cannot be sued thereunder. *Monroe* v. *Pape*, 365 U.S. 167.

It is clear that the Act does not provide that a monetary judgment might be obtained against a State thereunder; nor does it amend 42 U.S.C. § 1983 so as to bring States within its ambit as suable entities. Thus, there is a complete lack of "congressional authorization" to sue a State which this Court held in *Fitzpatrick, supra*, to be the essential basis for the maintenance of a suit against a State. The Eighth Circuit, in the opinion below, articulated no statutory foundation for the necessary Congressional authorization but alluded to the report of the Senate Judiciary Committee which accompanied S. 2278, which was enacted as the Act.[3] The Eighth Circuit did not particularize the precise language of the Report of the Senate Judiciary Committee upon which it relied to find Congressional authorization to sue a State, but it apparently had reference to the following language upon which the Fifth Circuit relied in *Gates* v. *Collier, supra*:

3. 548 F.2d, p. 742.

As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).[4]

Whatever uses might properly be made of legislative history, it cannot be properly utilized as the basis for finding Congressional authorization to sue a State, particularly in the circumstances of this case. This Court has stated with clarity that courts can look only to the plain, unambiguous and explicit language embodied in a statute enacted by Congress in determining whether Congress has authorized a State to be sued in a particular case. *Employees* v. *Missouri Public Health Department*, 411 U.S. 279; *Fitzpatrick* v. *Bitzer*, *supra*. This Court held that there was no sufficient evidence of Congressional authorization to sue a State in *Employees*, *supra*, and that there was sufficient evidence to demonstrate Congressional authorization to sue a State in *Fitzpatrick*. A brief analysis of these cases demonstrates the exacting standards to which this Court has adhered in determining whether there is a basis for finding Congressional authorization to sue. The decision in *Employees* turned on whether the 1966 Amendments to the Fair Labor Standards Act effected abrogation of the immunity of the State of Missouri to suit. Prior to the 1966 Amendments, § 3(d) of the Fair Labor Standards Act defined an "employer" so as to exclude any State or political subdivision of a State, but the 1966 Amendment provided that the § 3(d) exclu-

4. 559 F.2d, p. 243.

sion would not apply to employees of a State employed in certain institutions. The plaintiffs who brought suit in *Employees* were employed in institutions of the State of Missouri which were brought under coverage of the F.L.S.A. Amendments of 1966. However, Congress, in enacting the 1966 Amendments to the F.L.S.A. did not amend § 16(b), which provided that legal action might be instituted against "any employer" who violates certain provisions of the F.L.S.A. This Court held that the fact that Congress did not amend § 16(b) so as to specifically include a State within the all-inclusive term "any employer" was the determining factor in holding that Congress had not intended to abrogate the State's immunity to suit. In discussing *Employees*, this Court subsequently stated that the case "involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities."[5]

In *Fitzpatrick*, this Court considered the question of whether the 1972 Amendments to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) enacted by Congress, provided sufficient basis for finding a Congressional authorization to sue a State. The 1972 Amendments expressly provided that those subject to suit were "governments, governmental agencies [and] political subdivisions." The express exclusion of a State or political subdivision, although provided in § 701(b) of Title VII, was stricken by § 2(2) of the 1972 Amendments, and § 2(5) of the 1972 Amendments. The 1972 Amendments amended § 701 of Title VII to include within the definition of "employee" those individuals "subject to the civil service laws of a State government, etc." This Court held in *Fitzpatrick* that the clear, unambiguous, express, statutory pro-

5. *Edelman* v. *Jordan*, 415 U.S. 651, 672.

visions of the 1972 Amendments did provide sufficient basis for finding Congressional authorization to sue a State. This is the high standard which this Court has properly set for finding Congressional intent to abrogate the immunity of the States. The Civil Rights Attorney's Fees Award Act of 1976 falls far short of meeting this standard.

It is of more crucial importance that the high threshold of explicit Congressional statutory authorization be found in order to abrogate the immunity of a State at the present time than at the time of the decision of this Court in *Employees, supra.* The reason for this is that this Court is now apparently applying different standards and criteria in deciding whether abrogation has been effectuated. In *Edelman* v. *Jordan*, 415 U.S. 651, this Court reviewed its decisions in *Employees* and other cases involving acts of Congress based upon the Commerce Power and the Compact Power. This Court summarized the formulation of its standard for determining the question of abrogation or waiver of immunity as follows:

> The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, *and* whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.[6] [Emphasis added]

In its decision in *Fitzpatrick*, which involved an Act of Congress based upon § 5 of the Fourteenth Amendment, the only test applied is that of Congressional authorization to sue a State, with no linkage to an implied waiver by the State.

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6. 415 U.S., p. 672.

In these circumstances, in which abrogation of a State's immunity might be accomplished unilaterally by an Act of Congress, surely the highest standards of explicit statutory authorization to sue a State must be clearly evident. The use of legislative history to unilaterally effect abrogation should not be permitted. The power of Congress to unilaterally abrogate the immunity of a State to suit for monetary judgment is an awesome one. Courts should not depart from the text of an Act of Congress in order to find such a power. In *Skehan* v. *Board of Trustees of Bloomsburg State*, 436 F.Supp. 657, 666-667 (D.C., M.D. Pa., 1977), the Court made a clear analysis of the issues discussed above and cited *Employees* for the necessity of explicit statutory language subjecting the States to liability for attorney's fees in order to effect abrogation of the State's immunity.

II

The State of Arkansas Is an Absent Indispensable Party to This Action

The failure of the Act by its terms to vest jurisdiction in the Courts of the United States to join a State as a party defendant in a proceeding commenced, maintained, or prosecuted according to it has the inevitable consequence of making the State of Arkansas an absent indispensable party to this proceeding. As noted in Argument I, Arkansas is not a party to this case, nor could it be made a party. This defeats Federal jurisdiction, due to lack of an indispensable party defendant.

This Court has formulated and adhered to the principle that the rights, duties, obligations and liabilities of a State will not be adjudicated when the State is not a party to the proceedings. *Durfee* v. *Duke*, 375 U.S. 106, 115; *Arkansas* v. *Tennessee*, 246 U.S. 158, 176; and *Western Union*

Telegraph Company v. *Pennsylvania*, 368 U.S. 71, 75. This Court in *Western Union Telegraph Company, supra*, succinctly stated the proposition as follows:

> But New York was not a party to this proceeding and could not have been made a party, and, of course, New York's claims could not be cut off where New York was not heard as a party.[7]

This salutary rule, which gives States the right to be heard before monetary judgments are entered against them, would be grossly violated if the decision of the Eighth Circuit, from which this appeal is taken, is allowed to stand.

More specifically, this Court follows the doctrine that a State is an indispensable party to an action which seeks to recover a monetary judgment from its fisc. *Christian* v. *Atlantic and North Carolina Railroad Company*, 133 U.S. 233; *Belknap* v. *Schild*, 161 U.S. 11. Indicative of the strong position taken by this Court is the following language from *Christian, supra*:

> How the dividends due to the State can be seized and appropriated to the payment of the bonds, or how the stock held and owned by the State can be sold and transferred through the medium of a suit in equity, without making the State a party to the suit, it is difficult to comprehend. The general rule certainly is, that all persons whose interests are directly to be affected by a suit in chancery must be made parties.
>
> . . .
>
> The State has a direct interest to be affected by such a proceeding. The proposal is to take the property of the State and apply it to the payment of its debts

7. 368 U.S., p. 75.

> due to the plaintiffs, and to do it through the instrumentality of a Court of equity.
>
> . . .
>
> There is a class of cases, undoubtedly, in which the interests of the State may be indirectly affected by a judicial proceeding without making it a party.
>
> . . .
>
> Such cases do not affect the present, in which the object is to take and appropriate the State's property for the purpose of satisfying its obligations.[8]

And, in *Belknap* v. *Schild, supra*, the Court expounded upon the rule, as follows:

> In a suit to which the State is neither formally nor really a party, its officers although acting by its order and for its benefit, may be restrained by injunction, when the remedy at law is inadequate, from doing positive acts for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion and in violation of the Constitution or laws of the United States.
>
> . . .
>
> But no injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party.[9]

8. 133 U.S., pps. 241, 243, 244.

9. 161 U.S., p. 18.

This Court has interpreted revised Rule 19 of the Federal Rules of Civil Procedure relating to parties, and synthesized the provisions of Rule 19 with the line of decisions relating to necessary and indispensable parties. *Provident Bank and Trust Company* v. *Patterson*, 390 U.S. 102. This Court made it plain that the line of cases beginning with *Shields* v. *Barrow*, 17 How. 130, and including the cases above cited, dealing with necessary and indispensable parties is still the law, and that Rule 19 is to be used as a guide in interpreting the principles enunciated by *Shields* and its progeny in specific cases.

It is clear that the State of Arkansas is an absent indispensable party to this action which would result in a monetary judgment against its funds.

III

The Construction of the Civil Rights Attorney's Fees Award Act of 1976 Made by the Court Below Renders the Act Void As an Invasion of the Judiciary Power and of the Rights Retained by the State of Arkansas by the Tenth Amendment to the Constitution

The Act, by its terms, does not define the State of Arkansas as a "person" which can be sued as a defendant under the provisions of 42 U.S.C. § 1983; it does not, by its own terms, provide for the joinder of Arkansas as a defendant in this action; and it does not, by its terms, provide that a monetary judgment may be recovered thereunder from the funds of the State of Arkansas. That much is clear.

As noted previously in Argument I, the Eighth Circuit relied upon language contained in the report of the Senate Judiciary Committee, presumably the language previously cited in this brief, as the basis for holding the State of

Arkansas liable for a monetary judgment in the sum of $20,000. If the gloss of the language of the report of the Senate Judiciary Committee is to be read into the terms of the Act, then the Act is rendered void as an invasion of the Judiciary Power and of the rights retained by Arkansas by the Tenth Amendment to the *Constitution*. For the convenience of the Court, we herewith requote the language from the committee report:

> As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is named a party).

The effect of this language, if read into the terms of the Act, would be to create an irrebuttable presumption that a State is liable for a monetary judgment for attorney's fees whenever one of its officials is the losing party in an action brought under various Federal civil rights statutes. Such language could also be construed as presumptively "deeming" liability to monetary judgment on the part of a State regardless of the facts of the case.

This Court has struck down efforts of Legislatures to create irrebuttable presumptions of liability in civil cases. *Lindsley* v. *National Carbonic Gas Company*, 220 U.S. 61, and *Western and Atlantic Railroad* v. *Henderson*, 279 U.S. 639. In upholding the validity of a statutory presumption and distinguishing a permissible presumption from one which the legislative branch was forbidden to make, this Court stated:

"it establishes a rebuttable presumption but neither prevents the presentation of other evidence to overcome it nor cuts off the right to make a full defense." *Lindsley* v. *National Carbonic Gas Co., supra,* at page 82.

And, in *Western and Atlantic Railroad* v. *Henderson, supra,* this Court stated a similar rule. *Id.*, p. 642. Although *Lindsley* and *Western and Atlantic Railroad* pertained to legislative acts of State Legislatures, this Court has held that the same due process standards under the Fifth Amendment apply to Acts of Congress which attempted to create irrebuttable presumption of civil liability or to "deem" a party to be civilly liable. *Heiner* v. *Donnan,* 285 U.S. 312, 326, 329.

The State of Arkansas may or may not be entitled to due process of the law under the Fifth Amendment. But in this case, Arkansas, a sovereign State of the Union, has had no process, due or otherwise. It has had no opportunity to present its defense, including lack of jurisdiction under Article III of the *Constitution* and its immunity to suit under the Eleventh Amendment, to this monetary judgment which the Court of Appeals has ordered to be entered against it.

Surely, the right to have its immunity abrogated only by the most explicit unambiguous statutory language embodied in an Act of Congress and the right to be heard and present its defenses prior to an entry of a monetary judgment against it are among "the attributes of sovereignty attaching to every state government which may not be impaired by Congress", which this Court has recently held inhere in each State by operation of the Tenth Amendment to the *Constitution. National League of Cities* v. *Usery,* 426 U.S. 833, 845.

In *National League of Cities, supra,* this Court made it manifest that the obituary notice which some scholars and commentators had published for the 10th Amendment to the *Constitution* were premature. This Court sharply rejected the notion that the 10th Amendment was a mere "truism" or surplusage. Rather, the Court reaffirmed that that Amendment is a positive statement that certain rights of the States cannot be transgressed by Congress or any other Branch of the Federal Government.

CONCLUSION

Amicus submits that P.L. 94-559 does not authorize recovery of attorney's fees against a State; that the State of Arkansas is an absent indispensable party to these proceedings; and that the construction of P.L. 94-559 made by the Eighth Circuit would render that Act of Congress invalid.

Dated November 28, 1977.

Respectfully submitted,

A. F. SUMMER
Attorney General, State of Mississippi

P. ROGER GOOGE, JR.
Assistant Attorney General

PETER M. STOCKETT, JR.
Assistant Attorney General

Attorneys for Amicus Curiae, State of Mississippi

In the Supreme Court of the United States

October Term, 1976
No. 76-1660

TERRELL DON HUTTO, Sub Nom, JAMES MABRY, Commissioner, Arkansas Department of Correction, et al.,

Petitioners

v.

ROBERT FINNEY, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, AMICUS CURIAE

MELVIN R. SHUSTER
Deputy Attorney General
J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Chief, Civil Litigation
ROBERT P. KANE
Attorney General
Attorneys for Commonwealth of Pennsylvania, Amicus Curiae

Department of Justice
Capitol Annex Building
Harrisburg, PA 17120
717—787-5093

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, AMICUS CURIAE

INTEREST OF AMICUS

The Commonwealth of Pennsylvania submits this brief *amicus curiae* in support of the proposition advanced by the State of Arkansas that the Eleventh Amendment bars an award of attorney's fees against the state under either the Civil Rights Attorney's Fees

Awards Act of 1976 or the "bad faith" exception to the "American Rule" precluding fee awards. This question is of direct and substantial interest to the Commonwealth, which must defend numerous civil rights actions under 42 U.S.C. §1983 brought against both the Commonwealth and its officials. In such suits, the issue of the award of attorney's fees is a constantly recurring one.

In recent years, the number of civil rights actions filed in federal courts against state officials has radically increased. If successful litigants may recover awards of attorney's fees in such cases, the Commonwealth will be required to expend a portion of its already overburdened financial resources in the satisfaction of such claims. This prospect threatens a substantial invasion of the Commonwealth treasury which is unnecessary to the vindication of federal rights. Accordingly, we join the State of Arkansas in urging this Court to reverse the decision below affirming an award of attorney's fees payable with state funds.

SUMMARY OF ARGUMENT

In adopting the Civil Rights Attorney's Fees Awards Act of 1976, Congress did not broaden the substantive causes of action in which successful litigants may receive an award of attorney's fees. As a result, the Eleventh Amendment remains a bar to an award of attorney's fees against the state. The legislative history accompanying the Act erroneously interprets recent decisions of this Court, so that regardless of its intent, Congress failed to subject the states to fee awards in civil rights cases.

Even if the Attorney's Fees Act is applicable to the states, it should not be applied retroactively to pending cases. Placing such a heavy and unforeseen burden on the states and individual defendants would result in manifest injustice to litigants who have properly relied upon the long-standing immunity afforded by the Eleventh Amendment.

Alternatively, an award of attorney's fees predicated upon the state's "bad faith" is similarly unsupportable. Fees awarded on this basis are essentially punitive in nature and not necessary to insure compliance with federal law prospectively. Finally, this Court's decision in *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), awarding costs against a state, is not controlling on the question of attorney's fees.

ARGUMENT

I. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 IS NOT APPLICABLE TO THIS CASE

A. The Eleventh Amendment to the United States Constitution Bars the Application of the Attorney's Fees Act to the States

The Civil Rights Attorney's Fees Awards Act of 1976,[1] which was signed into law on October 16, 1976, provides:

> "Be it enacted:
>
> That the Revised Statutes section 722 (42 U.S.C. §1988) is amended by adding the following: 'In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, Title IX of Public Law 93-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.' "

[1] Pub. L. 94-559, 42 U.S.C. §1988 as amended (hereinafter Attorney's Fees Act).

Although respondents brought this action pursuant to 42 U.S.C. §1983,[2] which provides redress for the deprivation under color of state law of rights, privileges and immunities secured by the Constitution and laws of the United States, application of the Attorney's Fees Act is precluded by the operation of the Eleventh Amendment.[3] The settled and unassailable interpretation of Section 1983 is that neither a state nor any of its agencies is a "person" within the meaning of that statutory provision. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974); *U.S. ex rel. Gittlemacker v. Comm. of Pa.*, 281 F. Supp. 175 (E.D. Pa. 1968), *aff'd* 413 F.2d 84 (3rd Cir. 1969), *cert. denied* 396 U.S. 1046 (1970).

The court of appeals below affirmed an award of attorney's fees "to be paid out of the funds allocated to the Department of Correction." *Finney v. Hutto*, 548 F.2d 740, 742 (8th Cir. 1977). However, in providing for an award of attorney's fees in civil rights actions by its adoption of the Attorney's Fees Act, Congress did not broaden the substantive causes of action in which such an award could be made. Consequently, the State of Arkansas, along with every state, remains immune under the Eleventh Amendment from an award of Attorney's fees against it, notwithstanding

[2] R.S. §1979.

[3] The Eleventh Amendment provides:

> "The judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

the legislative history accompanying the Attorney's Fees Act to the contrary.

The Report of the House of Representatives Committee on the Judiciary, H.R. Rep. No. 94-1588, 94th Congress, 2nd Session (hereinafter House Report), at 7, concluded that governmental officials, who frequently are defendants in civil rights actions:

> ". . . have substantial resources available to them through funds in the common treasury including taxes paid by the plaintiffs themselves. . . . The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities."

Without any extended analysis, the Judiciary Committee simply relied upon this Court's decision in *Fitzpatrick v. Bitzer, supra,* in concluding: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments." House Report, at 7, n.14. However, the Judiciary Committee misinterpreted the impact of the Court's decision in *Fitzpatrick* upon Congress' power to abrogate the Eleventh Amendment.

In *Fitzpatrick,* this Court authorized the award of back pay in the form of past retirement benefits as money damages in a suit brought against the State of Connecticut pursuant to Title VII of the Civil Rights Act of 1964. However, Title VII had been expressly amended to subject governments, government agencies and political subdivisions to suit for violations of Title VII. The Court distinguished its prior decision in

Edelman v. Jordan, supra,[4] in which a retroactive award of damages had been denied because 42 U.S.C. §1983 does not contain any congressional authorization to join a state as defendant:

> "Our analysis begins where Edelman ended, for in this Title VII case the *'threshold fact of congressional authorization,'* 415 U.S. at 672, 94 S.Ct. at 1360, *to sue the State as employer is clearly present." Fitzpatrick v. Bitzer, supra,* at 452. (Emphasis supplied.)

The existence of such authorization, exercised pursuant to Congress' authority under Section 5 of the Fourteenth Amendment, was held by the Court to overcome the Eleventh Amendment defense asserted by the state in *Fitzpatrick*:

> "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."

Thus, while Congress *could have* subjected the states to awards of damages and attorney's fees in actions

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[4] In *Edelman,* recipients of benefits from federal-state programs of Aid to Aged, Blind and Disabled (AABD) brought a class action for declaratory and injunctive relief to bring about the timely processing of benefits and to recover retroactively payments wrongfully withheld. The Court affirmed the lower court's award of prospective injunctive relief, but reversed the affirmance by the court of appeals of the district court's order requiring the payment of retroactive benefits.

brought under 42 U.S.C. §1983, it did not do so, given the language of the Attorney's Fees Act. Rather, Congress simply rendered those "persons" already liable under the specified Civil Rights Act provisions liable for attorney's fees as well.

The Report of the Senate Judiciary Committee, S. Rep. No. 94-1011, June 29, 1976 (hereinafter Senate Report), exhibits a similar misconception as to the constitutional scope of the Attorney's Fee Act. As did the House Report, the Senate Report concluded that attorney's fees "will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." Senate Report, at 5. Since the Senate Report was prepared prior to this Court's decision in *Fitzpatrick v. Bitzer, supra,* the Senate Judiciary Committee couched its rationale in terms adopted from *Edelman v. Jordan, supra,* justifying the fee awards as "ancillary and incident to securing compliance with these laws" and "an integral part of the remedies necessary to obtain such compliance." Senate Report, at 5.

The Senate Judiciary Committee misinterpreted the language in *Edelman* which recognized that the expenditure of money from the state treasury by state officials in order to comply with the mandate of judicial injunctive decrees constitutes a permissible "ancillary effect on the state treasury." 415 U.S. at 668, 94 S.Ct. at 1358. Indeed, the Court rejected the concept of "equitable restitution" as a basis for granting a retroactive award of monetary relief, recognizing that such

recovery would undoubtedly be paid from state funds and would, therefore, be tantamount to an award of damages against the state.

The context of the "ancillary effect" language in the *Edelman* opinion establishes that the Court's focus was limited to the expenditure of state funds necessary for compliance with whatever injunctive relief that was afforded. Referring to prior Supreme Court decisions,[5] the effects of which were to increase future welfare benefits paid from state treasuries, the Court explained:

> "But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury then if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the State treasury is a permissible and often inevitable consequence of the principle announced in Ex Parte Young, supra.*" 415 U.S. at 668. (Emphasis supplied.)

Unlike the "ancillary effect" occasioned by prospective injunctive relief, the award of attorney's fees is more analogous to a recovery of damages for breach of a legal duty.

To hold otherwise would be to ignore the continued vitality of *Ex Parte Young,* 209 U.S. 123 (1908),

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[5] *See, Graham v. Richardson,* 403 U.S. 365 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

which has been viewed as "the culmination of this Court's efforts to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez v. Ledesma,* 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part).

In *Ex Parte Young, supra,* several railroads and their shareholders alleged the unconstitutionality under the Fourteenth Amendment of certain railroad rates, and sought and obtained in Federal court an injunction against the Attorney General of Minnesota restraining him from enforcing as against them penalties specified in the state act under challenge. The Attorney General claimed the Eleventh Amendment deprived the federal court of issuing such an order, and went ahead to enforce the criminal sanctions of the state act.

Upholding the lower court's power to restrain the Attorney General's actions and the subsequent action for contempt, this Court held:

> "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or his representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to *the Supreme authority of the United States.*" 209 U.S. at 159-60. (Emphasis supplied.)

In order to vindicate Constitutional law and overcome the Eleventh Amendment proscription against suits brought against the state, it was necessary for the Court to remove the mantle of sovereign immunity from the actions of state officials by creating the fiction that such actions represented breaches performed in an individual, not official, capacity. Such a theory had precedential support extending from *Osburn v. United States Bank,* 22 U.S. 738 (1824); *Davis v. Gray,* 16 Wall 203 (1872); and *Poindexter v. Greenhow,* 114 U.S. 270, 5 S.Ct. 903 (1855).

However, the Court also took cognizance in *Ex Parte Young* of those cases in which actions nominally brought against state officials to enforce the performance of contracts with the state actually constituted suits against the state itself, because if relief were allowed the state treasury itself would be directly affected. *Hagood v. Southern,* 117 U.S. 52 (1886); *In re Ayers,* 123 U.S. 443 (1887). The Court in *Edelman* specifically alluded to *Hagood* and *Ayers* to "demonstrate that equitable relief may be barred by the Eleventh Amendment." 415 U.S. at 667. Accordingly, the scope of the Court's decision in *Ex Parte Young* cannot be construed to have sanctioned federal jurisdiction to hear suits the result of which would be to effect recovery of funds from the state treasury. Rather, the thrust of *Ex Parte Young* was to insure the compliance of state officials with the supremacy of federal law and not to require the expenditure of state funds and thereby encroach upon a fundamental attribute of state sovereignty—its fiscal integrity.

Thus, the rule recognized by the Court's decision in *Edelman* is that when private parties seek to impose a

liability which must be paid from public funds in the state treasury, the Eleventh Amendment is a bar to such suit. Citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the Court concluded that, absent waiver by the state, the actual source of the funds to be recovered is determinative of the invocation of this defense:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantive party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. *Id.* at 464." 415 U.S. at 663.

Applying this analysis to the question of awarding attorney's fees under the Attorney's Fees Act, when a court enjoins a state official acting in his official capacity from further violating a plaintiff's constitutional right, the absence of personal liability in the official's individual capacity[6] dictates that any fee award could only run against the state. However, because the state is not a "person" under 42 U.S.C. §1983, the plaintiff cannot be deemed to have prevailed against the state. More importantly, the court lacks jurisdiction over the state or any of its agencies for the purpose of entering an award of attorney's fees against

[6] Only where a plaintiff could establish individual liability on the part of a state official could the official himself be subject to paying the attorney's fees. Otherwise, the policies inherent in the concept of official immunity would undeniably be forsaken, which clearly was not Congress' intent. *See, Pierson v. Ray*, 386 U.S. 547 (1967); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975).

them. *Fitzpatrick v. Bitzer, supra; Edelman v. Jordan, supra.* The parenthetical clause in the Senate Report, *supra* at 5, expressing the intention that the state treasury would be the source of fee awards "whether or not the agency or government is a named party" further demonstrates Congress' erroneous interpretation of this Court's controlling decisions and of all known concepts of jurisprudence.

Whatever its intent, Congress has not, by the express language of the Attorney's Fees Act, subjected the states to liability for attorney's fees. The legislative history summarily relied upon by the court below and by other courts which have awarded fees under the new act[7] has been shown above to misinterpret the relevant Supreme Court cases. As this Court observed in *Edelman v. Jordan, supra* at 676-77, "it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." In the absence of explicit statutory language subjecting the states to liability for damages and attorney's fees, the Court should be reluctant to find an implicit waiver of the states' immunity from suit under the Eleventh Amendment. *See,*

[7] *See, e.g., Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977), petition for writ of certiorari filed August 18, 1977; *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977); *Stanford Daily v. Zurcher*, 550 F.2d 468 (9th Cir. 1977); *cert. granted* October 3, 1977; *Commonwealth of Pennsylvania v. O'Neill*, 431 F. Supp. 700 (E.D. Pa. 1977); *Wade v. Mississippi Cooperative Extension Service*, 424 F. Supp. 1242 (N.D. Miss. 1976).

Employees of Department of Health & Welfare v. Missouri, 411 U.S. 279 (1973).

Precisely this analysis was employed by the district court in *Skehan v. Board of Trustees of Bloomsburg State College*, 436 F. Supp. 657 (M.D. Pa. 1977), which recognized Congress' power under the Fourteenth Amendment to limit the application of the Eleventh Amendment, *Fitzpatrick v. Bitzer, supra*, but also underscored its failure to do so explicitly in the Attorney's Fees Act:

> "But the Civil Rights Attorney's Fees Awards Act contains no language expressly allowing the recovery of attorney's fees from the states. . . . In the absence of explicit statutory language subjecting the states to liability for damages and attorney's fees, this Court will not imply a limit to the state's immunity to suit under the Eleventh Amendment. *See*, Employees of the Department of Health and Welfare v. Missouri, 411 U.S. 279 (1973)." 436 F. Supp. at 666, 667.

Accordingly, the award of attorney's fees against the Arkansas Department of Corrections should be reversed because Congress has failed to define the term "person" as used in 42 U.S.C. §1983 to include states or state agencies, thereby continuing their Eleventh Amendment immunity from monetary liability.

B. Even If the Attorney's Fees Act Is Applicable to the States, the Act Should Not Be Applied Retroactively

Citing *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), and the legislative history of the Attorney's Fees Act which relied upon it, the court of appeals concluded that this case was a pending case and therefore subject to the provisions of the Act. *Bradley*, however, is clearly distinguishable from the instant case, notwithstanding that the Attorney's Fees Act became law while the case was pending resolution by the court below.

In *Bradley*, this Court construed Section 718 of Title VII of the Emergency School Aid Act, 20 U.S.C. §1617, which granted authority to a federal court to award a reasonable attorney's fee against a local education agency, a state (or any agency thereof) or the United States (or any agency thereof) for violations of Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment, as they pertain to elementary and secondary education. Because the defendant in that case was a local school board, the Court was not called upon to address the issue of a state's Eleventh Amendment immunity and the propriety of retroactively applying legislation which would have a direct impact on a state's treasury. Consequently, the lower court's reliance upon *Bradley* ignores the fact that the State of Arkansas, unlike a local school board, is protected by the Eleventh Amendment.

Bradley does not stand for the proposition that a congressional enactment shall always be applicable to

pending cases. Rather, the Court predicated its decision upon the principle that:

> ". . . a court is to apply the law in effect at the time it renders its decision, *unless doing so would result in manifest injustice* or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. (Emphasis supplied.)

Although the Eleventh Amendment may be superseded by *proper* congressional action, *Fitzpatrick v. Bitzer, supra,* Congress does not have the plenary and nonreviewable power to thwart the Eleventh Amendment retroactively. This is especially true in the instant case, in which (1) the Attorney's Fees Act does not specifically apply to the states; (2) a state or state agency may not be joined as a defendant on the underlying cause of action, *Fitzpatrick v. Bitzer, supra; Edelman v. Jordan, supra;* and (3) the fiscal consequences are overwhelming.[8] While the protection afforded the states since 1798 by the Eleventh Amendment may now, in some situations, be altered by Congress, justice demands that the states at least be given notice that significant sums must *in the future* be set aside for attorney's fees awards.

This Court has recognized that a major purpose in providing for an award of attorney's fees in civil rights cases is to encourage litigants to bring suits to vindicate the public interest. *See, Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968). As to pending cases, such incentive is unnecessary. Prospective application of the Attorney's Fees Act would accomplish

[8] See remarks of Senator Helms at 122 Cong. Rec. 12432 (September 26, 1976).

this goal while enabling the states to better prepare for the increased financial burden they will bear if they must pay attorney's fees to successful litigants in civil rights actions brought under 42 U.S.C. §1983.

With respect to an individual state official named as a defendant in an action brought under 42 U.S.C. §1983, it is clear that, as previously discussed, retroactive application of the Attorney's Fees Act would not only violate his qualified official immunity, but would also result in a catastrophic financial injustice against an individual who happened to be the nominal state official subjected to suit in accordance with the holding in *Ex Parte Young, supra.* This result surely brings the Attorney's Fees Act within the doctrine that a statute will not be applied retroactively when manifest injustice will result. *Bradley v. School Board of the City of Richmond, supra.*

II. IN THE ABSENCE OF A STATUTORY PROVISION FOR ATTORNEY'S FEES, THE ELEVENTH AMENDMENT REMAINS A BAR TO AN AWARD OF ATTORNEY'S FEES ON THE GROUNDS OF BAD FAITH

As an alternative ground to the Attorney's Fees Act, the court of appeals accepted the district court's determination that an award of attorney's fees was justified in this case because of defendants' bad faith. *Finney v. Hutto,* 548 F.2d at 742, n.6. In *Alyeska Pipeline Service Company v. Wilderness Society,* 421 U.S. 240

(1975), this Court reinforced the traditional "American Rule" that attorney's fees are not ordinarily recoverable by the prevailing litigant in federal litigation absent statutory authority specifically providing for the award of such fees. At the same time, the Court recognized the inherent judicial power to allow attorney's fees in particular circumstances, including the willful disobedience of a court order or actions of the losing party performed "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co., supra* at 258-59 *(citing F. D. Rich Co., Inc. v. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974)).

However, in the absence of a statutory provision for attorney's fees, the Eleventh Amendment remains a bar to an award of attorney's fees on the grounds of bad faith. The Court in *Alyeska* specifically declined to reach this issue while noting the split in the decisional law. 421 U.S. at 269, n.44. Moreover, the Court minimized the precedential value of its summary affirmance in *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd* 409 U.S. 942 (1972). 421 U.S. at 269, n.46. Given the Court's later summary affirmance in *Murgia v. Commonwealth of Massachusetts Board of Retirement*, 386 F. Supp. 179 (D. Mass. 1974), *aff'd* 421 U.S. 972 (1974), the question of the states' Eleventh Amendment immunity to such fee awards remains an open one.

Prior to the adoption of the Attorney's Fees Act, the various circuit courts of appeals addressed this matter and reached different conclusions based upon different interpretations of this Court's decision in *Edelman*

v. Jordan, supra. The Court of Appeals for the Sixth Circuit, in *Jordan v. Gilligan*, 500 F.2d 701, 705 (6th Cir. 1974), *cert. denied* 421 U.S. 991 (1975), held that the substance and effect of a fee award directed only nominally against state officials "vitally affects the rights and interests of the state in preserving its revenues" and is therefore barred by the Eleventh Amendment.[9] In so holding, that court relied upon the following language in *Edelman*, 415 U.S. at 668, which focused upon the actual source of the funds to be recovered as determinative of the validity of the Eleventh Amendment defense:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its soverign immunity from suit even though individual officials are nominal defendants." *Edelman v. Jordan, supra* at 663.

This approach to the Eleventh Amendment reflects this Court's repeated recognition of the fundamental state interest in the conduct of its fiscal affairs and the constitutional necessity of strictly limiting federal intrusion into that sensitive area.

Appellate courts in other circuits have arrived at the opposite conclusion, relying upon *Edelman* for the proposition that the award of attorney's fees has a permissible "ancillary effect on the state treasury" resulting from compliance with the award of injunctive re-

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[9] *Accord, Huecker v. Milburn*, 538 F.2d 1241 (6th Cir. 1976); *Incarcerated Men v. Fair*, 507 F.2d 281 (6th Cir. 1974).

lief.[10] While these courts did not deny that such an award must issue from public funds in the state treasury, they viewed it as having a minimal impact upon state finances, as well as being a necessary incident to the award of injunctive relief.

The latter approach represents an unwillingness by these courts to come to grips with the basic jurisdictional premise underlying the application of the Eleventh Amendment and an attempt to overcome this jurisdictional bar by turning the doctrine of *Ex Parte Young* on its head. In effect, a suit successfully litigated solely against state officials in their official capacities, as in the instant case, would subject the state treasury to an award of attorney's fees notwithstanding that the state is not a party to the action and that the court lacks any jurisdiction over it. Certainly, this Court in *Edelman* did not predicate the recoverability of public funds upon the nominal indentity of the party sued, and indeed, held expressly to the contrary.

Moreover, the justification for any "ancillary effect on the State treasury" in *Edelman* was the necessity of future compliance with federal law, as a result of injunctive relief awarded by a court on the merits. The Court did not, however, consider an award of retroactive benefits, payable out of the state's treasury, nec-

[10] *Souza v. Travisono*, 512 F.2d 1137 (1st Cir. 1975), *vacated on other grounds*, 421 U.S. 983 (1976); *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974); *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975); *Hallmark Clinic v. North Carolina Dept. of Human Resources*, 519 F.2d 1315 (4th Cir. 1975); *Bond v. Stanton*, 528 F.2d 688 (7th Cir. 1976); *cert. granted*, 426 U.S. 905 (1976), *on remand*, 555 F.2d 172 (1977), *petition for cert. filed* August 18, 1977; *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974).

essary to effectuate federal law. *A fortiori*, it does not require that attorney's fees, payable from the same source, be awarded to plaintiffs as a reward for initiating the litigation.

Nor is an award of attorney's fees against the state necessary to contend with obstinate, obdurate litigation practices by defendants or outright bad faith. The inherent power of the court to hold a party in contempt is available in extreme circumstances. In addition, defendant state officials may be subjected to personal liability when they have acted beyond the scope of their discretion and in bad faith. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975). Naturally, the same breadth of immunity recognized as necessary for executive officials to perform fully and faithfully the duties of their offices must encompass their actions in the course of litigation. Otherwise, defendant state officials, out of concern either for personal liability or the imposition of liability upon the state treasury, might not pursue all appropriate legal means to defend fully those civil rights actions brought against them, to the detriment of the state interests they are duty-bound to represent.

The district court in the case at bar, unable to convincingly distinguish this case from *Alyeska Pipeline Service Co. v. Wilderness Society, supra*, went to considerable lengths to bring it within the "bad faith" exception to the *Alyeska* rule. The court conceded "a continuous albeit erratic course of improvement" in the Arkansas prison system and the initially cooperative attitude of state officials in implementing the court's directives. *Finney v. Hutto*, 410 F. Supp. 251,

284 (E.D. Ark. 1976). Despite some "hardening of Departmental attitudes" and what the court perceived as a lack of initiative by prison officials to uncover other abuses, the court declined to characterize their attitude as uncooperative, let alone obdurate or in bad faith. 410 F. Supp. at 284-85. At worst, the court identified constitutional deficiencies of which high prison officials were ignorant, but "which they eliminated when the facts were disclosed." 410 F. Supp. at 285. This inherent institutional inertia is illustrative of the type of circumstances to which courts must refer in the absence of individual bad faith as a justification for awarding attorney's fees against the state under this exception to the *Alyeska* rule. However, such an award embraces the same concept of punitive retroactive relief prohibited by the Court in *Edelman* under the Eleventh Amendment.

As the late Mr. Justice Black aptly observed in discussing the concept of federalism:

> "The concept [of federalism] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

See also, National League of Cities v. Usery, 426 U.S. 833 (1976). Considered in this light, an award of attorney's fees payable directly out of a state's treasury is not so essential to the effectuation of federal law that it outweighs the fundamental state interests embodied in the Eleventh Amendment.

Finally, this Court's decision to impose costs upon a state litigant in *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), does not provide authority for awarding attorney's fees, as some lower courts have held. *See, Souza v. Travisono*, 512 F.2d 1137, 1140 (1st Cir. 1975); *Thonen v. Jenkins*, 517 F.2d 37 (4th Cir. 1975); *Skehan v. Bloomsburg State College*, 538 F.2d 53, 58 (3d Cir. 1976). Unlike these cases and the case at bar, *Fairmont Creamery* originated as a criminal prosecution *by* the state and, therefore, technically was not "commenced or prosecuted against" the state as contemplated by the Eleventh Amendment.

Moreover, in *Fairmont Creamery*, costs were found to have been traditionally imposed where judgment was entered against a state, in accordance with Supreme Court rule.[11] Attorney's fees should not be equated with ordinary costs of litigation such as the expense of printing the record. Accordingly, *Fairmont Creamery* is distinguishable from the instant case and does not provide persuasive precedent for overcoming the application of the Eleventh Amendment as a bar to an award of attorney's fees against the state.

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[11] Rule 57 of the Supreme Court Rules presently governs the award of costs.

III. CONCLUSION

Throughout its decisions in Eleventh Amendment cases, this Court has sought to harmonize the supremacy of the Constitution and federal law with the fundamental independence of the states within the federal system. The Court has been especially sensitive to the potential encroachment on that independence which could result from assertions of federal power over the financial operations of the states. By limiting the scope of federal court rulings, absent statutory authority or state consent to suit, to prospective injunctive relief and avoiding direct impact upon the state treasuries, the Court has successfully preserved both values. The award of attorney's fees against the Arkansas Department of Corrections runs directly counter to the established precedent in this area of the law.

It is respectfully submitted that the decision of the court of appeals affirming the district court's award of attorney's fees should be reversed.

Respectfully submitted,

MELVIN R. SHUSTER
Deputy Attorney General
J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Chief, Civil Litigation

ROBERT P. KANE
Attorney General
Attorneys for the Commonwealth of Pennsylvania, Amicus Curiae

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1660

TERRELL DON HUTTO, Sub Nom. JAMES MABRY, Commissioner, Arkansas Department of Correction; MARSHALL N. RUSH, Chairman, Arkansas Board of Correction; EULA DORSEY, Vice-Chairman, Arkansas Board of Correction; THOMAS H. WORTHAM, M.D., Secretary, Arkansas Board of Correction; RICHARD E. GRIFFIN, Member, Arkansas Board of Correction; and JOHN ELROD, Member, Arkansas Board of Correction,
Petitioners,

vs.

ROBERT FINNEY, et al., *Respondents.*

BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

EVELLE J. YOUNGER,
Attorney General of the State of California.
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division.
EDWARD P. O'BRIEN,
Assistant Attorney General.
GLORIA F. DEHART,
Deputy Attorney General.
PATRICK G. GOLDEN,
Deputy Attorney General.
6000 State Building.
San Francisco, California 94102.
Telephone: (415) 557-0204.
Attorneys for the State of California, Amicus Curiae.

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BRIEF OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The State of California employs over 130,000 persons and, under state law, defends any employee or former employee against any claim or action arising out of an act or omission occurring within the scope of his employment. Calif. Govt. Code § 825, *et seq.* Imposition of attorneys' fees, even in a small percentage of cases, will have a direct and significant impact on the funds and fiscal management of the State of California.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the United States Constitution bars the recovery of attorneys' fees from a state treasury. Those circuits which have held otherwise have misconstrued this Court's opinion in *Edelman v. Jordan,* 415 U.S. 651 (1974). This conclusion cannot be altered by labeling an award of attorneys' fees against the state an "equitable remedy" or a "taxation of costs."

An award of attorneys' fees against state officials cannot be predicated upon the bad faith exception to the American rule prohibiting the award of attorneys' fees, since the state is the real party in interest and since any award of attorneys' fees would have a direct impact on the state treasury.

The Civil Rights Attorneys' Fees Awards Act of 1976 does not abrogate a state's Eleventh Amendment immunity and any attempt by Congress to do so would exceed the permissible scope of section 5 of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I

RECOVERY OF ATTORNEYS' FEES FROM THE STATE IS BARRED BY THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the United States Constitution, ratified in 1798, and unchanged since, provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

This Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. *Edelman v. Jordan* (1974) 415 U.S. 651, 662-663. In the instant case, although the State of Arkansas was not named a defendant, the lower court ordered the Arkansas Department of Corrections, a state agency, to pay $20,000.00 in attorneys' fees. Such an order has a direct impact on the funds and fiscal management of the State of Arkansas.

In *Edelman*, this Court held that retroactive payment of welfare benefits wrongfully withheld by state officials was barred by the Eleventh Amendment. *Id.* at 662-669. In so holding, this Court stated:

> "'[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." (Citations omitted). *Id.* at 663.

In so ruling, this Court specifically distinguished *Ex parte Young* (1908) 209 U.S. 123:

> "But the relief award in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct

of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.

"But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman." *Id.* at 664.

This Court also held that labeling an award "equitable restitution" does not evade the Eleventh Amendment bar. *Id.* at 665-666. Further, it was held that the State of Illinois did not waive its Eleventh Amendment protection or consent to be sued because it had participated in a federal AABD program. *Id.* at 671-677.

Amicus submits that the rationale of *Edelman* applies to respondents' request for attorneys' fees. There is no doubt, as in *Edelman,* that the award of attorney's fees has a direct impact upon the funds and fiscal management of the State of Arkansas. Significantly, this Court has summarily affirmed a decision of a three-judge district court in the First Circuit which denied an award of attorneys' fees both as a matter of law and discretion. *Murgia v. Commonwealth of Mass. Bd. of Retirement* (D.Mass. 1974), 386 F.Supp. 179, *judgment affirmed,* 421 U.S. 972.

Amicus recognizes that some circuits have taken the position that an award of attorneys' fees is permissible, on the grounds that such an award has only an "ancillary effect on the state treasury" resulting from compliance with the order of injunctive relief. E.g., *Jordan v. Fusari* (2nd Cir. 1974) 496 F.2d 646. However, an analysis of *Edelman* does not support the conclusion of these circuits. This Court in *Edelman* did not leave at large what was meant by the phrase "ancillary effect." The phrase comes at the end of a paragraph at 415 U.S. 667-668 in which this Court discusses *Ex parte Young* (1908) 209 U.S. 123, as well as two of this Court's more recent welfare cases, and notes that the decrees in those cases would have an effect on the states' funds. "But," this Court stated, "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees by which by their terms were prospective in nature." 415 U.S. at 667-668. This is the "ancillary effect" that this Court describes as permissible.

In the next paragraph, this Court distinguished the decree it was reviewing from those it had referred to:

"It requires payment of state funds, not as a necessary consequence of compliance in the future with the substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." 415 U.S. at 668.

It can hardly be argued that an award of attorneys' fees can be classified as a "necessary consequence of

compliance in the future with a substantive federal-question determination. . . ."

The argument has also been made that since an award of attorneys' fees resembles more closely the incidental costs sanctioned by this Court in *Fairmont Creamery Co. v. Minnesota* (1927) 275 U.S. 70 such an award is permitted by the Eleventh Amendment. See *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 460 (concurring opinion of Stevens, J.). This argument must fail, for several reasons. First, an award of attorneys' fees has been regarded by this Court as quite unlike an award of taxable costs. *Sprague v. Ticonic Bank* (1939) 307 U.S. 161. This distinction has been followed by circuit courts. See, e.g., *Swanson v. American Consumer Industries, Inc.* (7th Cir. 1975) 515 F.2d 555, 559-560. Secondly, while it is quite true that in *Fairmont,* supra, this Court held that costs could be taxed against Minnesota, it is noteworthy that in that case there is no mention of the Eleventh Amendment. *Fairmont* involved review of a state court decision affirming a criminal conviction. The Eleventh Amendment was not discussed because it had no possible application. The amendment speaks only to suits "commenced or prosecuted *against* one of the United States. . . ." It does not reach a prosecution commenced by the state itself. A state cannot insulate itself from review of its criminal convictions, when they are attacked on federal constitutional grounds, by arguing that under the Eleventh Amendment this Court has no jurisdiction. This much has been settled since the landmark case of *Cohens v.*

Virginia (1921) 6 Wheat. (19 U.S.) 264. Unlike *Fairmont Creamery,* the *civil* suit in the instant case was commenced *against* Arkansas. *Fairmont Creamery* has no application to suits commenced *against* a state.

In any event, any argument that *Fairmont Creamery* supports the imposition of attorneys' fees against the state has been put to rest by this Court in *Edelman v. Jordan, supra.* Labeling attorneys' fees as "costs" is as much an invasion of the Eleventh Amendment as labeling retroactive damages "equitable restitution." *Edelman, supra,* at 665-666.

II

AN AWARD OF ATTORNEYS' FEES AGAINST A STATE MAY NOT BE PREDICATED UPON THE BAD FAITH EXCEPTION TO THE AMERICAN RULE PROHIBITING AN AWARD OF ATTORNEYS' FEES.

In *Alyeska Pipe Line Service Company v. Wilderness Society* (1975) 421 U.S. 240, this Court disapproved the "private attorney general" approach as a basis for court-awarded attorneys' fees in public interest litigation unless authorized by statute. However, *dicta* in the *Alyeska* opinion appears to recognize the continuing validity of the "bad faith" exception to the traditional American rule limiting an award of attorneys' fees (*Id.* at 257-259) and the Eighth Circuit also stated in *dicta* that the bad faith exception applied in this case. Amicus submits that the bad faith exception has no application in the instant case.

This issue was not discussed in *Alyeska, supra,* as the Court of Appeals deemed it inappropriate to burden the State of Alaska with any part of the award. 421 U.S. at 246. Amicus submits that the Eleventh Amendment bars an award of attorneys' fees when relief is sought against a state official. In such a case, the purpose of the action is to remedy a state practice, not to impose a monetary liability against the state for past deprivations of constitutional rights. A state official has both the right and the duty to follow state law. When a constitutional right is alleged to have been violated and a federal suit is filed, the official, as an officer of the state, defends the state interest and, as an officer of the state, will, if ordered, comply with the court order. In such a case the state is the real party in interest. The official is merely a nominal party.[1] To award attorneys' fees on a bad faith theory is tantamount to an award of attorneys' fees against the state and is therefore barred by the Eleventh Amendment. Granting attorneys' fees in an injunctive suit against a state official by labeling the conduct "bad faith" is as much an evasion of the Eleventh Amendment bar as labeling a retroactive monetary award against a state "equitable restitution." In both cases the real party in interest, the state, is being ordered by a federal court to hand over state funds to a private party. In both cases, the Eleventh Amendment, as explained in *Edelman,* prohibits such an award.

[1]This fact is recognized in Rule 25(d) of the Federal Rules of Civil Procedure, which allows substitution of officials in suits seeking injunctive relief.

This is not to say that an individual state official cannot be held personally responsible for a direct and knowing contempt of a federal court order, or that an individual state official cannot be personally liable for damages in a proper suit in which the plaintiff overcomes the official's qualified executive immunity. See *Schuerer v. Rhodes* (1973) 416 U.S. 232, 238. However, amicus submits that in a contempt proceeding or a damage suit, unlike his position in a suit seeking injunctive relief, the state official is himself the real party in interest.

Redress for the personal acts of state officials during the pendency of an injunctive suit may not be had under the guise of an award of attorneys' fees. Such redress must be sought only in contempt proceedings or a damage action.

III

THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 DOES NOT ABROGATE A STATE'S ELEVENTH AMENDMENT IMMUNITY AND ANY ATTEMPT BY CONGRESS TO DO SO WOULD EXCEED THE PERMISSIBLE SCOPE OF SECTION FIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Civil Rights Attorneys' Fees Awards Act of 1976 does not abrogate a state's Eleventh Amendment immunity.

In ordering the award of attorneys' fees in this case, the Eighth Circuit relied upon the Civil Rights Attorneys' Fees Award Act of 1976, Public Law No. 94-559, 90 Stat. 2640 (Oct. 19, 1976) (hereinafter "The Act") which states, *inter alia:*

> "In any action or proceeding to enforce a provision of sections . . . 1979 [42 U.S.C. § 1983] . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fee as part of the cost."

Amicus submits that this Act cannot be interpreted to apply to a state. The settled and unassailable interpretation of section 1983 is that neither a state nor any of its agencies is a "person" within the meaning of that provision. *Edelman v. Jordan* (1974) 415 U.S. 651; *United States ex rel. Gittlemacker v. Comm. of Pa.* (E.D. Pa. 1968) 281 F.Supp. 175, *aff'd* (3rd Cir. 1969) 413 F.2d 84, *cert. denied* (1970) 396 U.S. 1046. In providing for an award of attorneys' fees in certain civil rights actions by its adoption of the Act, Congress did not change the definition of "person" against whom an action may be brought. Consequently, Arkansas is still immune under the Eleventh Amendment from an award of attorneys' fees against it, notwithstanding the indications to the contrary in the legislative history accompanying the Act.

The Report of the House of Representatives Committee on the Judiciary, H.R. Rep. No. 94-1588, 94th Congress, 2nd Session, September 15, 1976 (to accompany H.R. 15460), at 7, concluded that governmental officials, who frequently are defendants in civil rights actions

> ". . . have substantial resources available to them through funds in the common treasury, including taxes paid by the plaintiff themselves. . . . The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities."

Without any extended analysis, the Judiciary Committee simply relied upon this Court's decision in *Fitzpatrick v. Bitzer, supra,* 427 U.S. 445, in concluding: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state government." House Report, at 7, n. 14. It is submitted that the Judiciary Committee misinterpreted the impact of the Court's decision upon Congress' power to abrogate the Eleventh Amendment.

In *Fitzpatrick,* this Court authorized the award of back pay in the form of past retirement benefits as money damages in a suit brought against the State of Connecticut pursuant to Title VII of the Civil Rights Acts of 1964. However, Title VII had been expressly amended to subject governments, government agencies and political subdivisions to suit for violations of Title VII. The Court distinguished its prior decision in *Edelman v. Jordan, supra,* in which a retroactive award of damages had been denied, because Title 42, United States Code section 1983 does not contain any Congressional authorization to join a state as defendant. The existence of such authorization under Title VII, exercised pursuant to Congress' authority under section 5 of the Fourteenth Amendment, was held by the Court to overcome the Eleventh Amendment defense asserted by the state in *Fitzpatrick.* As stated by this Court:

> "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." 427 U.S. at 456.

Unlike the legislation in issue in *Fitzpatrick,* in the instant case, Congress did *not* subject the states to awards of damages and attorneys' fees in actions brought under Title 42, United States Code section 1983. Rather, Congress merely rendered those "persons" already subject to suit under the Civil Rights Act provisions specified therein as subject to an award of attorneys' fees as well. Consequently, unlike a Title VII suit, there is no "threshold . . . congressional authorization" which allows a section 1983 suit to be brought against a state. 427 U.S. at 452.

The Report of the Senate Judiciary Committee, No. 94-1011, June 29, 1976 (to accompany section 2228) exhibits a similar misconception as to the constitutional scope of the Act. As did the House Report, the Senate Report concluded that attorneys' fees "will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party)." Senate Report, at 5. Since the Senate Report was issued prior to this Court's decision in *Fitzpatrick v. Bitzer, supra,* the Senate Judicial Committee couched its rationale in terms apparently adopted from *Edelman v. Jordan, supra,* justifying the fee

awards as "ancillary and incident to securing compliance with these laws" and "an integral part of the remedies necessary to obtain such compliance." Senate Report at 5. For the reasons noted, *supra,* pp. 4-6, the Senate Judiciary Committee's reliance on the "ancillary" language in *Edelman* is misplaced.

Whatever its intent, Congress has not, by the express language of the Act, subjected states to liability for attorneys' fees. As stated by the United States District Court, Middle District of Pennsylvania, in dealing with this issue: "In the absence of explicit statutory language subjecting the states to liability for damages and attorneys' fees, this Court will not imply a limit to the state's immunity under the Eleventh Amendment." *Skehan v. Bd. of Trustees of Bloomsburg State* (M.D. Pa. 1977) 436 F.Supp. 657, 667.

B. Any Congressional attempt to abrogate the immunity of the Eleventh Amendment and subject the states to the payment of attorneys' fees exceeds the permissible scope of the Fourteenth Amendment to the United States Constitution.

Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, *by appropriate legislation,* the provisions of this article." (Emphasis added.)

Amicus submits that any legislation that imposes on a state the burden of financing a prison suit is not "appropriate legislation."

In our federalist system, "there is a sensitivity to the legitimate interests of both State and National

Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in a way that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris* (1971) 401 U.S. 37, 44. No state interest requires more protection from undue Congressional interference than a state's law enforcement system. If Section 5 of the Fourteenth Amendment grants Congress such unbridled and non-reviewable power, a state's right to administer its criminal justice system have been greatly eroded, and the existence of federalism will depend solely upon Congressional majority rule.

This is especially the case in section 1983 suits, in which state officials are already subject to suits seeking injunctive relief and money damages. The added cost of attorneys' fees, which in many cases may result in a greater financial burden on a state than the expense of compliance with a court order, imposes an unreasonable chilling effect on a state's right to defend against civil rights actions.

Moreover, there is no practical protection afforded a state against suits of harassment. Even if a state could meet the more rigid standard imposed by the Act and prove an action is vexatious or frivolous or was instituted *solely* to harass or embarrass (Assembly Report at 6-7), the plaintiff in such action is generally judgment proof. Consequently, a plaintiff in a prison case generally has nothing to lose by initiating an action, however groundless. The state, on the other

hand, constantly runs the risk of substantial monetary losses each time an official is sued.

To the extent that *Fitzpatrick v. Bitzer, supra,* sanctions such wholesale intrusions into state treasuries, amicus suggests that this Court reevaluate its position, reaffirm our federalist system, and hold that the Fourteenth Amendment does not give Congress the power to overrule the Eleventh Amendment and authorize the imposition of monetary claims against states.

CONCLUSION

For the foregoing reasons, amicus respectfully request that the judgment of the Court of Appeals awarding attorneys' fees be reversed.

Dated, November 30, 1977.

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division,
EDWARD P. O'BRIEN,
Assistant Attorney General,
GLORIA F. DEHART,
Deputy Attorney General,
PATRICK G. GOLDEN,
Deputy Attorney General,
Attorneys for the State of California, Amicus Curiae.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1660

TERRELL DON HUTTO, Sub Nom, JAMES MABRY, Commissioner, Arkansas Department of Correction; MARSHALL N. RUSH, Chairman, Arkansas Board of Correction; EULA DORSEY, Vice-Chairman, Arkansas Board of Correction; THOMAS H. WORTHAM, M.D., Secretary, Arkansas Board of Correction; RICHARD E. GRIFFIN Member, Arkansas Board of Correction; and JOHN ELROD, Member, Arkansas Board of Correction,

Petitioners,

vs.

ROBERT FINNEY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF OF STATE OF IOWA

RICHARD C. TURNER
Attorney General of Iowa

STEPHEN C. ROBINSON
Special Assistant Attorney General

THEODORE R. BOECKER
Assistant Attorney General

FREDERICK M. HASKINS
Assistant Attorney General

State Capitol
Des Moines, Iowa 50319

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AMICUS CURIAE BRIEF OF STATE OF IOWA

AMICUS BRIEF AUTHORIZED

The State of Iowa files this *amicus curiae* brief pursuant to United States Supreme Court Rule 42, subparagraph 4.

INTEREST OF THE STATE OF IOWA

The State of Iowa submits this *Amicus Curiae* Brief in support of the position of the State of Arkansas for the reason that, like the State of Arkansas, the State of Iowa is faced with a growing number of prison suits under 42 U.S.C. § 1983 and therefore will inevitably be faced with the constitutional problem of an award of attorney fees pursuant to the 1976 Civil Rights Attorney's Fees Act (42 U.S.C. § 1988) payable from its treasury. This is true even though an officer or employee of the State of Iowa is sued, in his individual or official capacity or both, for the reason that pursuant to the Iowa Tort Claims Act, Iowa Code § 25A.22 (1977), (See Addendum A), the State will indemnify the individual, thus prompting an award to flow directly from the treasury of the State of Iowa. In any case, an award of attorney's fees would abrogate Iowa Constitution, Article III, § 24, (See Addendum A), which precludes money being drawn from the state treasury other than in consequence of appropriations made by law, inasmuch as there would be no appropriation by the Iowa General Assembly for attorney's fees. Hence, an award of attorney's fees nominally against an individual officer but in fact payable out of the state treasury would directly undermine the republican principle of federalism as much as would such an award against the State itself.

If, pursuant to 42 U.S.C. § 1988, an award of attorney fees is deemed to be recoverable from a state of the Union, it will not only present an enormous burden upon the treasuries of the various states and be in contravention of the Eleventh Amendment to the Constitution of the United States of America, but will also have a "chilling effect" upon the defense by the states of the laws they have enacted to deal with the difficult and intractable problems of enhancing the public welfare. Accordingly, the State of Iowa urges the reversal of the decision of the Eighth Circuit Court of Appeals on the question of the permissibility of an award of attorney's fees under the Eleventh Amendment.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the United States Constitution has the effect of precluding a monetary award payable from the treasury of the State absent congressional authorization for such an award. An award of attorney's fees falls within the category of a monetary award. Here, there is no congressional authorization for an award of attorney's fees from the Arkansas Department of Corrections, an agency of the State of Arkansas. In light of the clear exclusion of states as "persons" under 42 U.S.C. § 1983 – the statute upon which the present action is based – authorization cannot be accomplished by a cursory comment in the legislative history of 42 U.S.C. § 1988. Therefore, Congress has not acted in a manner sufficient to override the Eleventh Amendment immunity of the states so as to permit an award of attorney's fees against the Arkansas Department of Corrections.

An examination of the fundamental position occupied by the Eleventh Amendment in our Constitution compels the conclusion that an act as profound as congressional authorization for recovery against a state treasury – in effect, waiver of the State's Eleventh Amendment immunity – can be accomplished only by the clearest and most express language. Such language is not present in 42 U.S.C. § 1988. Therefore, it is evident that the Eleventh Amendment protects the State of Arkansas and its Department of Corrections from the award of attorney's fees granted by the Eighth Circuit Court of Appeals.

ARGUMENT

THE ELEVENTH AMENDMENT BARS THE RECOVERY OF ATTORNEY'S FEES FROM THE STATE BECAUSE OF A LACK OF NECESSARY CONGRESSIONAL AUTHORIZATION.

In the case of *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976), an action arising under Title VII of the Civil Rights Act of 1964, the Court held that in order for an award of attorney's fees payable from a state treasury to escape the bar of the Eleventh Amendment, there must be " 'the threshold fact of

congressional authorization' . . . to sue the State." Here, there is an absence of congressional authorization for an award of attorney's fees against the State of Arkansas or its Department of Corrections. The text of 42 U.S.C. § 1988 authorizes attorney's fees in actions under 42 U.S.C. § 1983, the statute under which the present action was brought. But a state or its agencies cannot be sued under that statute. As the Court indicated in *Fitzpatrick v. Bitzer, supra*, at 452, "[t]he Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe v. Pape*, 365 U.S. 167, 187-191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include states as parties defendant". The significance of the inability under 42 U.S.C. § 1983 to sue a state or its agencies is set forth in *Edelman v. Jordan*, 415 U.S. 651, 675-677 (1974) as follows:

> [I]t has not heretofore been suggested that § 1983 was intended to create a waiver of a state's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself.

The effect of the above-quoted language is that merely because an action under 42 U.S.C. § 1983 is brought against individual state officers or employees does not mean that the state treasury can be held accountable for attorney's fees under 42 U.S.C. § 1988. This is because when these individuals are made defendants, either in their individual or official capacity, the state treasury is the real party in interest, as the various states will ultimately reimburse these individuals. This stems from the fact that the various states have either a statutory or moral obligation to protect and indemnify their officers and employees from monetary awards which arise solely by virtue of their employment. It is obvious that if the states failed to do this, they could hardly be expected to be able to employ qualified individuals because of the proliferation of suits brought under 42 U.S.C. § 1983 – a statute utilized in this day and age to attack virtually every aspect of state action.

In the instant situation, the bar of the Eleventh Amendment is fully in place, because there is a total absence of congressional authorization in 42 U.S.C. § 1988 for an award of attorney's fees payable by a state. Such authorization cannot be supplied by a cursory comment[1] in the legislative history of that statute. Given the limited scope of the word "person" in 42 U.S.C. § 1983, congressional authorization for an award of attorney's fees payable by a state requires nothing less than a change in the language of 42 U.S.C. § 1983 itself. This conclusion is dictated by the fundamental position which the Eleventh Amendment occupies in our Constitution and system of federalism. In *Edelman v. Jordan, supra*, at 674, it was found that provisions of the Social Security Act "fell far short of a waiver by a participating state of its Eleventh Amendment immunity." In *Employees v. Missouri Public Health Department*, 411 U.S. 279 (1973), it was held that Congress had not been explicit enough in the statutory text of the Fair Labor Standards Act to override the Eleventh Amendment, where even though the particular state functions in question were encompassed within the literal definition of an "employer" covered by the act, the enforcement provisions contained no specific reference to the states.

If waiver by the states themselves of their Eleventh Amendment immunity will be founded only upon the most express terms or language, then it follows that Congress, acting as the representative of the states under § 5 of the Fourteenth Amendment, can lift that immunity only in the same manner. Here, it has failed to do so, given the strict standard of waiver that must necessarily be read into any attempt to deprive the states of their fundamental Eleventh Amendment immunity. In light of the exclusion of the states from the language of 42 U.S.C. § 1983, an act as profound in its ramifications for the concept of federalism as congressional deprivation of the states' Eleventh Amendment immunity cannot be accomplished by anything less than statutory expansion of the language of 42 U.S.C. § 1983. Supporting this view is the fact that in *Fitzpatrick*

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1. The comment referred to is contained in S. Rep. No. 94-1011, 94th Congress, 2nd Session 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913.

v. Bitzer, supra, at 452, the " 'threshold fact of congressional authorization' . . . to sue the State" was found only after Congress, through amendments in 1972, changed the express language of Title VII of the Civil Rights Act of 1964 to include all "governments". It is important to note that legislative history standing alone was not relied upon in *Fitzpatrick* to support the finding of the requisite congressional authorization for suit. Hence, it can be concluded that Congress, in 42 U.S.C. § 1988, has not overridden the Eleventh Amendment immunity of the states and that that amendment thus protects the states from an award of attorney's fees under 42 U.S.C. § 1988.

A waiver of the Eleventh Amendment immunity cannot be inferred from the continued operation of a prison system by a state. Hence, the decision in *Parden v. Terminal Railway*, 377 U.S. 184 (1964), has no relevance here. The following remarks in the concurring opinion of Justice Marshall in *Employees v. Missouri Public Health Dept., supra*, at 296, are fully applicable in the instant case:

> For me at least, the concept of implied consent or waiver relied upon in Parden approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver. [Cases]. Certainly, the concept cannot be stretched sufficiently further to encompass this case. Here the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case.

These statements regarding hospitals and schools hold true to an even greater extent for state prisons. Obviously, the running of a state penal system is an example of sovereign activity of the most fundamental nature. Nothing could be further from the commercial activity in *Parden* than the operation of a state

prison. Untenable is the notion that a voluntary waiver of the Eleventh Amendment immunity can arise from a state's continuing to run its prison system after the passage in 1976 of 42 U.S.C. § 1988.

Further, an award of attorney's fees cannot escape the Eleventh Amendment by being characterized as merely having an "ancillary effect" on the state treasury. Dollar-for-dollar, an award of attorney's fees depletes a state treasury as much as any other award. Moreover, it is well-known that the amount demanded and allowed for attorney's fees is continually rising, *see, e.g., Commonwealth of Pennsylvania v. O'Neal*, 431 F. Supp. 700 (E.D. Pa. 1977) [attorney's fees of $199,788.37], and given the ever-perilous condition of state fiscs, a financial crisis could conceivably be produced by an award of attorney's fees under 42 U.S.C. § 1988. This is to say nothing of the severe "chilling effect" on the good faith defense by the states of the laws they have enacted and the measures they have taken to deal with the difficult and intractable problems of enhancing the public welfare produced by the prospect of an award of attorney's fees.

It should be noted that the case of *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927), cannot be read to stand for the proposition that the Eleventh Amendment has no applicability with regard to "ancilary" matters such as costs. *Fairmont Creamery* involved a writ of error in the United States Supreme Court and must be confined to that unusual context. It was intimated long ago in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821), that a writ of error is not a "suit" under the Eleventh Amendment. Thus, the taxation of costs in this Court, on a writ of error, stands, for purposes of the Eleventh Amendment, on an entirely different footing from such a taxation in the lower federal courts. This conclusion is further buttressed by the fact that this Court is a constitutionally-created court, rather than a congressionally-created one. Therefore, this Court stands on an equal plane with the states under the Constitution, which the lower federal courts do not. Accordingly, the concept of sovereignty which lies behind the Eleventh Amendment cannot provide the kind of defense to a

taxation of costs against the state in the United States Supreme Court than it can to such a taxation in the lower courts.

CONCLUSION

The Eighth Circuit Court of Appeals, by looking to the legislative history of 42 U.S.C. § 1988 rather than to the language of 42 U.S.C. § 1983, applied an incorrect standard in determining whether there had been a congressional deprivation or lifting of the Eleventh Amendment immunity with respect to attorney's fees. For this reason, the Eighth Circuit's judgment must be reversed and the case remanded with directions to that court to order the District Court to vacate the award of attorney's fees.

Respectfully submitted,

RICHARD C. TURNER
Attorney General for the
State of Iowa

STEPHEN C. ROBINSON
Special Assistant Attorney
General

THEODORE R. BOECKER
Assistant Attorney General

FREDERICK M. HASKINS
Assistant Attorney General

ADDENDUM A

IOWA CONSTITUTION, ARTICLE III, § 24:

> Appropriations. SEC. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.

IOWA TORT CLAIMS ACT, IOWA CODE § 25A.22 (1977):

> 25A.22 Actions in federal court. The state shall defend, indemnify and hold harmless an employee of the state in any action commenced in federal court under section 1983, Title 42, United States Code, against the employee for acts of the employee while acting in the scope of employment. If the acts or omissions of the employee, upon which the action is based, are within the exceptions to claim as defined in section 25A.2, subsection 5, paragraph "b", the state shall not indemnify or hold harmless the employee.

CERTIFICATE OF SERVICE

I, Theodore R. Boecker, Assistant Attorney General for the State of Iowa, hereby certify that on this 1st day of December, 1977, three (3) copies of the foregoing *AMICUS CURIAE* BRIEF OF THE STATE OF IOWA were mailed, correct postage prepaid, to:

Philip E. Kaplan
Walker, Kaplan & Mays, P.A.
622 Pyramid Life Building
Little Rock, Arkansas 72201

Stanley Bass
Suite 2030
10 Columbus Circle
New York, New York 10019

I further certify that all parties required to be served have been served.

THEODORE R. BOECKER
Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-1660

* * *

Terrell Don Hutto, Sub Nom, James Mabry, Commissioner, Arkansas Department of Correction; Marshall N. Rush, Chairman, Arkansas Board of Correction; Eula Dorsey, Vice-Chairman, Arkansas Board of Correction; Thomas H. Wortham, M.D., Secretary, Arkansas Board of Correction; Richard E. Griffin, Member, Arkansas Board of Correction; and John Elrod, Member, Arkansas Board of Correction,

Petitioners

V.

Robert Finney, et al.,

Respondents

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* * *

BRIEF OF AMICUS CURIAE, THE STATE OF TEXAS

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

JOE B. DIBRELL
RICHEL RIVERS
NANCY SIMONSON
Assistant Attorneys General

Attorneys for Respondents

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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NO. 76-1660

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Robert Finney, et al.,

Respondents

• • •

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

• • •

BRIEF OF AMICUS CURIAE, THE STATE OF TEXAS

• • •

INTEREST OF AMICUS CURIAE

The State of Texas files this *amicus* brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of Texas have a vital interest in the question presented on the grant of certiorari in this case concerning the application of the Civil Rights Attorney's Fees Awards Act of 1976, Public

Law 94-559, 94th Congress, Oct. 19, 1976, *amending* 42 U.S.C. §1988 (Cum. Supp. 1977).[1]

For the reasons set forth below, the State of Texas will be affected by the ultimate disposition of the questions concerning the award of attorneys' fees in the case presented for review before this Honorable Court. The Texas Department of Corrections, like the Arkansas Board of Correction, has been ordered in several cases to pay attorneys' fees pursuant to the new Act. Three such awards are presently pending for review by the United States Court of Appeals for the Fifth Circuit. The district court orders awarding attorneys' fees in these cases are attached hereto as Appendix A, B, and C. The resolution by this Court of the questions concerning the recent amendment to 42 U.S.C. §1988 will guide the disposition of the Texas cases by the Fifth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

Because Congress failed to amend the Civil Rights Statutes to which 42 U.S.C. §1988 applies to include states and their governmental agencies within the definition of "persons" subject to suit, the states' eleventh amendment immunity has not been revoked with sufficient specificity. Therefore, the states cannot be held liable for fee awards under the new Act.

In the alternative, should the Court hold that the Act

[1]Although the district court awarded the attorneys' fees pursuant to the "bad faith" exception to the American Rule that each litigant must pay his own lawyer, the Court of Appeals upheld the award solely on the grounds of the new Awards Act and did not pass on the issue of bad faith. *Finney v. Hutto*, 548 F.2d 740, 743 n. 6 (8th Cir. 1977). Accordingly, this brief will deal only with the propriety of the award pursuant to the new Act.

does revoke the states' sovereign immunity, Texas urges that retroactive application of the Act would be manifestly unjust. The revocation of an important right of the states accompanied by the unexpected and unplanned-for monetary liability works an extreme hardship upon state agencies, compared with the unexpected profits to be gained by the plaintiffs' counsel in §1983 litigation. For these reasons, Texas urges that retroactive application of the Act would be improper.

ARGUMENT AND AUTHORITIES

I. The Act Fails To Revoke, With Requisite Specificity, The States' Eleventh Amendment Immunity.

The district court award of attorneys' fees in the instant case specified that the award will be paid out of state funds in the hands of the Department of Corrections rather than by the individual defendants personally. *Finney v. Hutto*, 410 F.Supp. 251, 282 (E.D. Ark. 1976). Likewise, the awards assessed against defendants in the Texas cases must necessarily be made out of funds from the state treasury. The State of Texas urges that any such payment, retroactive in nature, is barred by the eleventh amendment absent statutory authorization for such an award made pursuant to the fourteenth amendment and *expressly* including the state as a party against whom such an award may be made. *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).[2]

[2]The Circuits are in conflict as to whether an award of attorney's fees is barred by the eleventh amendment. *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert denied*, 421 U.S. 991 [barred]; *Skehan v. Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974) *vacated on other grounds*, 421 U.S. 983 (1975) [barred]; *Jordan v. Fusari*; 496 F.2d

(continued)

Several courts have considered the legislative history of the Act, which indicates an intent on the part of Congress to make states liable for attorney's fees, to be sufficient to revoke the states' eleventh amendment immunity.[3] However, Texas respectfully urges that the Act fails to abolish the states' immunity from monetary damages regardless of the apparent intent of the Congressional supporters of the Act.

In *Fitzpatrick*, the case upon which Congress based its authority to revoke a state's eleventh amendment immunity[4], this Court held that the states' eleventh amendment immunity was limited by Title VII of the civil rights statues, which was enacted pursuant to the enabling provisions of the fourteenth amendment, because:

> in this Title VII case, the "threshold fact of congressional authorization" [citation omitted] to sue the State as employer is *clearly present.* This is, of course, the prerequisite found present in *Parden* and wanting in *Employees.* . . . The substantive provisions are by express terms directed at the States.

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646 (2nd Cir. 1974) [not barred]; *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974) [not barred]; *Boston Chapter N.A.A.C.P., Inc. v. Beecer*, 504 F.2d 1012 (1st Cir. 1974) [not barred]; *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975) [not barred]. Defendant urges that an award such as that ordered in this case, under the *Edelman* logic, would be barred as a retroactive monetary liability.

[3]*Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977); *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Wade v. Mississippi Cooperative Extension Service*, 424 F.Supp. 1242(N.D.Miss.1976); *Gary W. v. State of Louisiana*, 429 F.Supp. *711 (E.D. La. 1977).*

[4]*See* Civil Rights Attorney's Fees Awards Act of 1976: Source Book—Legislative History, Texts, and Other Documents, 94th Cong., 2d Sess. at 215 (H. Rep. 7) and 255 (Remarks of Cong. Drinan).

Fitzpatrick, id. at 452 [emphasis supplied]. In *Fitzpatrick*, the statute which this Court held clearly allowed a damage award and an attorneys' fee award against the state was U.S.C.§2000e, *et seq.* (1970 ed.), which defines a "person" who may be sued under the act as including governments and governmental agencies. The Court found "relevant" the fact that the act there in question expressly allowed suits against the states. *Id.*, at 449 n.2.

Even though the legislative history of the amendment to §1988 may indicate that some members of Congress intend to abolish the states' immunity to the extent that an award of attorneys fees could be made against state funds, congressional intent alone is insufficient to effect such an abolition. In order to effect a waiver of the states' sovereign immunity, the statute *by express terms* must be directed at the states. *Employees v. Dept. of Public Health and Welfare*, 411 U.S. 279 (1973).

The instant action, like the Texas cases noted in the Appendices hereto, is brought pursuant to 42 U.S.C. §1983 and the fourteenth amendment to the constitution. It is well established that the states and their political subdivisions are not "persons" within the meaning of 42 U.S.C. §1983. *Monroe v. Pape*, 365 U.S. 167 (1961). Congress, by design or oversight, failed to amend the definition of "persons" who are subject to the proscriptions of §1983 and thus an attorneys' fees award under §1988, to include states or their political subdivisions. Only such an *express* amendment would satisfy the requirements of *Fitzpatrick* for Congressional abolition of the states' sovereign immunity from §1983 suits. Thus, unlike the Title VII litigation in question in *Fitzpatrick*, an award of attorneys' fees payable out of state funds in a §1983 action is barred by the eleventh amendment. *Skehan v. Board of Trustees*, ___F.Supp. _____, 46 U.S.L.W. 4045

(M.D. Pa., July 20, 1977); *Shanon v. U.S. Dept. of HUD*, 433 F.Supp. 249 (E.D. Pa. 1977).

II. Even If The Act Property Abolishes The States' Immunity, Retroactive Application Of The Act Is Manifestly Unjust.

In the instant case, the district court awarded $20,000 in attorney's fees for work performed prior to the effective date of the amendment to §1988. Thus far, $184,312.20 in attorneys' fees has been awarded against the Texas Department of Corrections pursuant to §1988 for work performed prior to the effective date of the Act. Several other requests for fee awards are now pending in the district courts. These figures represent only a small percentage of the work performed on behalf of civil rights plaintiffs in suits against the states prior to the effective date of the Act. Even if this Court finds that the Act properly abolishes the states' sovereign immunity, Texas urges the Court that retroactive application of the Awards Act would be manifestly unjust, and thereby improper. *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974).

Prior to the enactment of the Awards Act, the states' sovereign immunity prohibited attorneys' fees awards except in certain unusual cases. If this Court finds that the Act has abolished the states' sovereign immunity, then a significant right of the states has been affected by the amendment. By contrast, the states' opposing parties in §1983 civil rights litigation had no right or expectation of an award of attorneys' fees except in the unlikelihood that a finding of bad faith on the part of the state is found. Thus, retroactive application of the Act would allow a windfall profit for plaintiffs' attorneys in pending civil right actions while imposing a completely unexpected, staggering monetary liability upon the state agencies involved in§1983 litigation.

If the Act is to be applied retroactively, the potential obligation of state agencies for services rendered prior to the effective date of the Act is enormous. The Texas Department of Corrections alone has been assessed over $180,000 in attorneys' fees in only three cases. State agencies will be forced to divert vital funds from agency operations to satisfy the heretofore unexpected obligation. The funds from which the awards must be satisfied will likely have been appropriated by state legislatures for other purposes, and in order to meet the obligation, agency services will be curtailed. Such an unexpected and unplanned-for obligation is completely unreasonable when planners for the states and their agencies had no opportunity to even take into consideration the potential obligation and when state defendants had no opportunity to take the fee award potential into consideration when discussing defenses and trial strategy.

Thus, because the new Act has abolished an important right of the states and thereby exposed the states and their agencies to an unexpected, significant monetary liability, retroactive application of the Act would work manifest injustice. The State of Texas therefore urges the Court to hold that retroactive application of the new Act is improper.

CONCLUSION

For the reasons set forth above, Texas urges the Court to reverse the Appeals Court's award of attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976 on the grounds that the Act fails to revoke the states' sovereign immunity from monetary judgments. In the alternative, if the Court finds that the Act properly abolishes the states' sovereign immunity, Texas urges the Court to rule that retroactive application of the Act to the states would be manifestly unjust, thereby improper.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General
Chief, Enforcement Division

RICHEL RIVERS
Assistant Attorney General

NANCY SIMONSON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3821

CERTIFICATE OF SERVICE

I, David M. Kendall, First Assistant Attorney General of Texas, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in The Supreme Court of the United States in the above mentioned cause on behalf of the State of Texas. I do hereby certify that three copies of the foregoing Brief of Amicus Curiae has been deposited in the United States mail, certified, postage prepaid, on this the _____ day of December, 1977, to the following addresses:

Mr. Phillip E. Kaplan
Walker, Kaplan & May, P.A.
622 Pyramid Life Building
Little Rock, Arkansas 72201

Mr. Stanley Bass
Suite 2030
10 Columubus Circle
New York, New York 10019

Robert A. Newcomb
Arkansas Dept. of Correction
P.O. Box 8707
Pine Bluff, Arkansas 71611

DAVID M. KENDALL
First Assistant Attorney General

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Guadalupe Guajardo, Jr., et al.,	(	
Plaintiffs,	(	
V.	(	Civil Action No. 71-H-570
W. J. Estelle, Jr., Director, Texas Department of Corrections, et al.,	(	
Defendants.	(	

ORDER

In a previous Order, entered May 17, 1977, this court determined that plaintiffs are entitled to an award of reasonable attorneys fees in this case. The court has carefully considered the affidavits submitted by plaintiffs' attorneys, which set out the hours spent on various stages of the litigation (preparation of appellate briefs, pretrial preparation and discovery, negotiations and work regarding rules revisions, trial time, posttrial work on substantive issues, time on attorneys fees issue) and the hourly rates requested. The court believes that the fees and costs plaintiffs seek are eminently reasonable in all but one particular.

In arriving at a figure representing reasonable attorneys fees, the court has been guided by the factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974):

(1) the time and labor required,

(2) the skill requisite to properly perform the legal services,

(3) preclusion of other employment by the attorney due to acceptance of the case,

(4) the novelty and difficulty of the questions presented,

(5) the customary fee,

(6) whether the fee is fixed or contingent,

(7) time limitations imposed by the client,

(8) the amount involved and the results obtained,

(9) the experience, reputation, and ability of the attorneys,

(10) the undesirability of the case,

(11) the nature and length of the professional relationship with the client, and

(12) awards in similar cases.

The court has also found the recent decision of Judge Bue in *Cruz v. Beto*, Civil Action No. 71-H-1371 (S.D. Tex., March 3, 1977), most helpful in making the determination of reasonable fees and courts in this case.

The court is well acquainted with the efforts of plaintiffs' counsel over the past six years and is therefore in a better position than in other less exhaustively litigated cases to evalute what fees are "reasonable". Although plaintiffs' counsel did not keep detailed time records during some stages of the case, the affidavits submitted adequately itemize the hours expended. Those hours certainly do not appear excessive. Defendants have not challenged the accuracy

or adequacy of the affidavits in any event. The court sees no reason to eliminate from the calculation hours spent during the previous appellate stages of this case. The court finds that the numbers of hours listed in plaintiffs' affidavits are reasonable and reflect labor necessary to the successful resolution of this case.

The court further finds that plaintiffs were ably served by their attorneys, who faced the task of dealing both with the complicated substantive questions presented in the case and with the procedural obstacles which cropped up regularly during the protracted course of this litigation. Plaintiffs' attorneys skillfully met all challenges.

The court notes that the attorneys involved devoted themselves to this civil rights class action without any expectation of payment, a fact which alone would make this case "undesirable". The court is also well aware that the class action aspects of the case imposed tremendous demands on plaintiffs' attorneys. Moreover, their work on this case clearly precluded the attorneys from taking other employment.

The reasonableness of the hourly rates now submitted is not challenged by defendants, and those rates certainly appear to be in line with customary local charges. The court therefore concludes that the total amount of attorneys fees sought in this case is reasonable and approves fees in the amount of $127,565. The court finds that plaintiffs are also entitled to recovery of the $6,672.20 claimed for costs incurred for travel expenses, telephone calls, and the like.

The only item of costs that the court will exclude is the $1,495 sought for law clerk services. It is the court's impression that law clerk programs are used by law firms for a variety of purposes. Firms hire law clerks not only to do legal research but also to give students

exposure to the legal world, to recruit new lawyers for the firm, and to maintain ties with local law schools. The court therefore believes that an award of costs for law clerk services is inappropriate. The court finds that the costs for paralegal services and LEXIS time, a total of $4,557, and properly recoverable however.

Defendants request that the court make findings of fact specifying the amount and nature of time spent by plaintiffs' attorneys in connection with both the settlement agreement, preliminarily approved on June 9, 1976, and the proceedings which followed. Defendants also request that the amount spent giving notice of the proposed settlement, a total of $7,872.60, be treated as an offset to the court's award of costs. It is defendants' position that plaintiffs unjustifiably reneged on settling this case and thus should receive no fees from the time spent negotiating towards the June settlement agreement up until the present. The court disagrees. As the court has previously stated, both the change in case law occasioned by *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976), and the objections of the class necessitated renewed negotiations. Memorandum and Order of April 22, 1977, at 3. Had plaintiffs attorneys acquiesced in the settlement agreement once such developments came to light, they clearly would have disserved their clients' interests. Defendants' charges of delay and implications of bad faith on the part of plaintiffs' attorneys are wholly unwarranted. Defendants' requests are accordingly denied.

To summarize, the court orders that plaintiffs recover their costs including:

Attorneys fees	$127,565.00
Disbursements	6,672.20
Paralegal services	4,515.00
LEXIS time	42.00
	$138,794.20

DONE at Houston, Texas, on the *7th* day of *June*, 1977.

[John V. Singleton]
United States District
Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Guadalupe Guajardo, Jr. et al.,	(	
Plaintiffs,	(	
V.	(	Civil Action No. 71-H-570
W. J. Estelle, Jr., Director, Texas Department of Corrections, et al.,	(	
Defendants.	(	

FINAL JUDGMENT

Upon the court's Memorandum and Order of April 22, 1977, the court's Order of May 17, 1977, recognizing the propriety of awarding counsel fees and the court's determination of reasonable counsel fees, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. *Declaratory Judgment.* The rules and regulations of the Texas Department of Corrections ("TDC") are unconstitutional in the respects set forth in the court's Memorandum and Order of April 22, 1977. Those rules

attached hereto as Exhibit A incorporate the minimum changes necessary in the existing TDC correspondence rules to protect the constitutional rights of the plaintiff class described in the court's Order Clarifying Class Action Determination of September 23, 1976. These rules will adequately protect the interests of the TDC in the security and order of the institutions and the rehabilitation of the inmates.

2. *Costs and Attorneys Fees.* Plaintiffs shall recover from defendants in their official capacity, the Texas Department of Corrections and the State of Texas, their costs in this action, including reasonable attorneys fees, in the total amount of $138,794.00, together with interest at the legal rate from the date of judgment. The individual defendants shall not be personally liable in their individual capacity for plaintiffs' costs.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, on the *7th* day of *June*, 1977.

[John V. Singleton]
United States District
Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

David Ruiz, et al. (
(
V. (Civil Action No. 5523

W. J. Estelle, Jr., Director
Texas Department of Corrections

ORDER GRANTING AWARD OF COUNSEL FEES PENDENTE LITE

Before the court for consideration is the motion for award of attorney's fees *pendente lite* filed by the named plaintiffs in the above-styled and numbered civil action, which is brought pursuant to 42 U.S.C. §1983 and the Fourteenth Amendment.

The plaintiffs have invoked the recently enacted Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, as amended, to support their claim for such an award. The Act provides as follows:

> In any action or proceeding to enforce a provision of [§1983, *inter alia*], the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The defendant argues that such an award is improper in this instance for three reasons:

---

[1]At the time the motion was filed, William Bennett Turner, Esquire, was counsel for these plaintiffs. All the hours claimed represent his labors. Stanley A. Bass, Esquire, has now replaced Mr. Turner as counsel for the named individuals.

(1) An award of attorney's fees against this defendant is barred by the Eleventh Amendment.

(2) The statute does not provide for recovery of fees for work performed prior to the date of the enactment.

(3) The plaintiffs' attorney has not met the burden of proof required to justify an award of attorney's fees.

For the reasons that follow, the court finds the defendant's arguments to be without merit.

Congress has determined that the amendment providing for attorneys' fees would extend to actions under 42 U.S.C. §1983 where the payment of such fees would be awarded against the States.

> The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th Amendment. That Amendment limits the power of the Federal courts to entertain actions against a state. This issue is no longer seriously in dispute after the recent Supreme Court decision in *Fitzpatrick against Bitzer*. Since this bill is enacted pursuant to the power of Congress under section 2 of the 13th Amendment and section 5 of the 14th Amendment, any questions arising under the 11th Amendment is resolved in favor of awarding fees against State defendants.

Remarks of Congressman Drinan, 122 Cong. Rec. 12160 (October 1, 1976). *See also* H.R. Report No. 94-1558, 94th Cong.2d Sess., P. 7, n. 14, Sept. 15, 1976; and Senate

Report No. 94-1011, 94th Cong. 2d Sess. P. 4 (June 29, 1976). The Senate Committee found that the "effects of such fee awards are ancillary and incident to securing compliance with these [civil rights] laws, and that fee awards are an integral part of the remedies necessary to obtain . . . compliance." *Id.*

Such a determination is within the power of Congress, where, as here, the legislation is enacted pursuant to Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Accordingly, the Eleventh Amendment must be held not to bar the award of attorney's fees in this action. Accord, *Gary W. v. State of Louisiana*, 429 F. Supp. 711 (E.D. La. 1977).

Defendant next argues that an award of fees for services performed before the passage of the statute is beyond the scope of the Act. This argument clearly is at variance with the legislative history of the Act. Congressman Drinan, who sponsored the legislation, explained that

> . . . this bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In *Bradley versus Richmond School Board*, the Supreme Court expressly applied that long-standing rule to an attorney fee provision, *including the award of fees for services rendered prior to the effective date of the statute.*
> (Emphasis supplied.)

Id.

Nor does the court find support for the defendant's position in the case of *Bradley v. Richmond School District*, 416 U.S. 696 (1974), and its progeny in the Fifth Circuit. *See, e.g., Thompson v. Madison County Bd. of*

Education, 496 F.2d 682 (5th Cir. 1974). In the instant case, as in *Bradley*, there is no suggestion that had the defendant known that these fees would be recoverable under such a statute, different policies would have been employed "so as to render this litigation unnecessary and thereby preclude the incurring of such costs." *Bradley* at 721. Thus, there is no reason to depart from the rule in civil cases that ordinarily a court will apply the law in existence at the time it renders its decision. If the plaintiffs otherwise make out a claim for such fees, they may receive payment for services rendered prior to the enactment of the statute.

The defendant's third argument must also fail. Certainly, the plaintiff has the burden of proving his "entitlement to an award of attorney's fees just as he would bear the burden of proving a claim for any other money judgment," *Johnson v. Georgia Highway Express, Inc.*, 448 F.2d 714, 720 (5th Cir. 1974) (Title VII). Plaintiffs' attorney has produced affidavits and expert and other testimony that provide the court with sufficient evidence to evaluate the claim. Although provided additional time to do so after the hearing, the defendant has not offered any additional evidence to refute either the number of hours claimed or the hourly rate based on counsel's expertise. Thus, the court has considered the plaintiffs' claim for attorney's fees *pendente lite* on the basis of the evidence adduced at the hearing.

Under the guidelines set out in *Johnson v. Georgia Highway, supra*, the court finds the claim to be adequately supported by credible evidence. Furthermore, the amount claimed is reasonable as payment for the limited services set out in the motion for the award of attorney's fees. These services include: (a) obtaining, enforcing and defending on appeal the orders issued for the protection of plaintiffs and the class

pendente lite; (b) certifying the class of TDC prisoners; and (c) successfully opposing defendant's efforts in this court, the Fifth Circuit, and the Supreme Court to dismiss the United States from this action. The plaintiffs' success in these undertakings, as well as the negotiated settlement on some of the matters raised in the motion for preliminary relief, warrant the finding that the plaintiffs have prevailed on matters of "substantial rights" of the parties and thus are properly considered a "prevailing party" for purposes of interim award of attorney's fees. *See Bradley v. Richmond School Board, supra,* at 721-24; House Report No. 94-1558, *supra,* p. 8.

Counsel has filed an affidavit setting out his credentials, legal experience, publications, list of professional activities, and a statement of services for which claim is made, noting the number of hours charged for each service. The affidavit, attached hereto, is hereby incorporated in and made a part of this order.

The following is the court's evaluation of this claim under the criteria set out in *Johnson v. Georgia Highway Express, Inc., supra.*

(1) *The time and labor required.*

Plaintiffs allege 197 hours legal work covering selected services rendered during the two years between November 26, 1974 and November 16, 1976. The claim here does not include secretarial or non-legal work.

With the exception of three entries (recording 30, 21 and 62 hours), each charge is easily verified by reference to the docket sheet and correspondence on file in this action. Moreover, the hours charged for each service

listed are quite reasonable,[2] and the court has no difficulty in finding that each of these claims is meritorious.

As noted *supra,* three entries consist of services for which thirty or more hours are claimed. Such lumping together of services under one claim for a large number of hours has complicated the court's task in evaluating these claims. In the event that counsel should apply for additional attorney's fees later in the litigation, he is instructed to submit such claims by listing the single service and hours claimed for that service.

Plaintiff has claimed payment for thirty hours in resisting the defendant's motion to dismiss the United States as plaintiff-intervenor. This claim includes preparation of briefs for this court, the Fifth Circuit, and the Supreme Court, as well as argument in the district and circuit courts. (Travel time is not reflected in this figure.) In view of the complexity of the legal issues involved and upon examination of the excellent research and briefing provided by counsel, the court finds that thirty hours is a reasonable and fair claim for these services.

Plaintiffs also claim thirty-two hours prosecuting the motion to punish for contempt and for further preliminary relief, which involved a two-day evidentiary hearing in this court on May 22 and 23, 1975. Plaintiffs' presentation reflected extremely thorough preparation, including presentation of testimony from several witnesses, as well as the filing of an excellent post-hearing brief. The motion itself recites

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[2]In making this determination, the court has held counsel to the very highest standard of expertise, *see* (10), *infra,* and has evaluated the time claimed under the standard of time required by highly competent and experienced counsel to perform the services under scrutiny.

extensive grounds for relief, and the plaintiffs' vigorous prosecution of the motion by briefing and presentation of carefully gathered facts strongly support a claim for thirty-two hours of legal work.

The final lump sum claim by the plaintiffs, alleging sixty-two hours legal services, is much more difficult to evaluate. Following is the court's allowance for the services claimed:

Investigation and negotiations on harrassment, including very extensive correspondence on file	15
Preparation of Motion for Further Preliminary Relief (May 20, 1976)	2
Negotiations and preparation of Stipulation on Motion	5
Preparation for and Participation in Six Depositions	25
Preparation For and Participation in Evidentiary Hearing, July 15, 1976, on Motion for Further Preliminary Relief	30
Preparation of Proposed Findings of Facts and Conclusions of Law	2
Reply to Opposition to Motion for Further Preliminary Relief	1
Total	80 hours

Thus, the plaintiffs' claim of 62 hours for these services is very reasonable and probably represents somewhat less time than was actually spent by counsel on these services.

(2) *The novelty and difficulty of the questions.*

In this actions, the plaintiffs challenge the defendant's practices and policies in areas involving access to the courts, medical services, security, and conditions of living and working. While the law recognizing the plaintiffs' claims in these areas, if properly made out, is at least partly established, the complex and massive fact-gathering involved in preparing such a case for trial mandates that this civil action properly be characterized as complex. Moreover, there have been highly unusual procedural problems, including mandamus to remove a party from the case, as well as extensive motions for protections, to prohibit retaliation against members of the class.

This class action thus represents highly complex litigations, which has been pending for over two and one-half years, and which has already been before the Court of Appeals for the Fifth Circuit twice and the Supreme Court once. The hourly fee should reflect this complexity.

(3) *The skill requisite to perform the legal services properly.*

Counsel's work product has been consistently superior. The court would rate the caliber of work performed for the services claimed as being equal to the standards of the most competent two percent of attorneys practicing before this court.

(4) *The preclusion of other employement.*

Counsel for the individual plaintiffs is employed by the NAACP Legal Defence Fund. This, he has not personally been precluded from other employment, in the sense that prosecuting this case has somehow limited his economic alternatives. However, the court is guided in this matter by the Fifth Circuit's admonition

in *Fairley v. Patterson*, 493 F.2d 598, 606-07 (5th Cir. 1974):

> This Court has indicated on several occasions that allowable fees and expenses may not be reduced because appellant's attorney was employed or funded by a civil rights organization and/or tax exempt foundation or because the attorney does not exact a fee. . . . Whether the attorney charges a fee or has an agreement that the organization that employs him will receive any awarded attorneys' fees are not bases on which to deny or limit attorneys' fees or expenses.

See also, Thompson v. *Madison County Bd. of Education, supra*, at 689; *Lee* v. *Southern Homesites Corp.*, 444 F.2d 143, 147 n. 3 (5th Cir. 1971); *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 538-39l (5th Cir. 1970).

To the extent that this class action represents, as it does, complex substantive and procedural issues requiring extensive fact-gathering, the commitment to the instant litigation is massive and open-ended, and necessarily limits plaintiffs' counsel in undertaking other similar litigation.

(5) *The customary fee.*

There is not a standardized or customary fee in this district for this type litigation. As early as 1971, this court recognized that especially protracted and difficult civil rights litigation could command a fee as high as $80.00 an hour, if successfully prosecuted. *Boyd Peters et al. v. Missouri-Pacific Railroad Co.*, Civil Action No. 1325, Marshall Division (Order of June 24, 1971, granting plaintiffs $44,000 attorneys' fees in a Title VII

class action), *aff'd*, 483 F.2d 590, 500 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973). Other cases have recognized lesser fees, where the complexity of the litigation or expertise of counsel warranted. While attorneys' fees ordinarily may be calculated differently for court-time and work performed out of court, the specific services for which reimbursement is sought here represent work so closely tied with court appearances or formalized negotiations that the court finds that, in this instance, these services merit the same fee as in-court appearance. There are no claims at this rate for non-legal work, which would surely command a lesser fee. Nor are claims made for the time of any counsel other than lead counsel. The work of associates may, and probably would, be reimbursed at a lower fee. Thus, in holding that the rate of $75.00 an hour is proper for the award of these particular fees *pendente lite*, the court does not establish an unyielding rate to be applied to any future award of attorneys' fees in this case, regardless of the nature of the legal work involved or the expertise of the counsel for whose time reimbursement is sought.

(6) *Whether the fee is fixed or contingent.*

Where the attorney takes the risk of recovering no fees if the case is lost, he is entitled to have this factor considered in passing on the amount of fees recoverable. In the present case, the plaintiffs were not obligated to pay any fees, and counsel was relegated to obtaining from the court favorable rulings on the merits, as well as on the amount of his fees, before he could hope to recover.

(7) *Time limitations imposed by the client or the circumstances.*

Work undertaken on the protective motions,

negotiations, and the mandamus proceedings required certain priority treatment by counsel which would justify a "premium" in fees. *Johnson v. Georgia Highway Express, Inc., supra*, at 718.

(8) *The amount involved and the results obtained.*

In this case there is no prayer for monetary damages, nor have the final results of the litigation been determined. The plaintiffs have obtained, and defended on appeal, however, certain interim protective orders which were addressed to the rights of class members as well as the named plaintiffs. Furthermore, counsel has successfully negotiated the expungement of certain information from the records of some of the named plaintiffs. Moreover, counsel has prevailed before the Fifth Circuit in obtaining a denial of the writ of mandamus to dismiss the United States as plaintiff-intervenor. Last, counsel has successfully certified the class of T.D.C. prisoners. These results, although interim, have inured to plaintiffs' advantage in prosecuting this civil action, and in some respects, the protective orders and negotiations represent concrete improvements in the conditions of confinement for the entire class.

(9) *The experience, reputation, and ability of Counsel.*

The court in *Johnson* recognized that "[a]n attorney specializing in civil rights cases may enjoy a higher rate for his expertise than others, providing his ability corresponds with his experience." 488 F.2d at 719.

Plaintiffs' counsel is a nationally known expert in prisoners' rights, whose publications and previous litigation experience support a claim for the highest possible fees available in this type litigation. *See* appendix attached. Indeed, as plaintiffs pointed out in

their argument on this point, the defendant stated to the Fifth Circuit in an interim appeal in this case that plaintiffs' counsel "enjoys a national reputation for his ability to represent prisoners in this type of litigation." Petition for Rehearing *In re Estelle*, No. 75-1464 (5th Cir., August 1975).

(10) *The undesirability of the case.*

This court knows from practical experience that there are very few attorneys who voluntarily represent prisoners, especially without assurance of receiving a fee. This professional reluctance is magnified where, as here, the prisoner challenges the practices and policies of the public officials. The undesirability of prosecuting such claims should be reflected in attorneys' fees.

(11) *The nature and length of professional relationship with the client.*

This factor would also support a higher fee scale, since it is highly unlikely that counsel will enjoy a continuing, profitable relationship with the plaintiffs after the completion of this litigation.

(12) *Awards in similar cases.*

As in the criterion of customary fees, there is not an established line of similar cases with which the court can earnestly compare the present civil action. Not suprisingly, each party has armed itself with purportedly analogous cases (school desegregation, Title VII, illegal search and seizure, and antitrust), that would seemingly permit the court to award fees ranging from $35 an hour to $500 an hour. The single most analogous case cited was *Miller v. Carson*, 401 F. Supp. 835 (M.D. Fla. 1975), wherein the court awarded lead counsel $60 an hour for in court time. In view of this court's determination as set out in (5) *supra*, that the particular services herein reimbursed would be paid at the premium court appearance rate, and in further

consideration of the fact that the *Miller* case was concerned with only pretrial detainees in one county jail, whereas the present case challenges numerous practices throughout a state prison system, the court finds that the hourly rate of $75 is not out of line with the award in *Miller*. (The court notes that the final attorneys' fee award in *Miller* was $45,792.)

In consideration of all the foregoing reasons, and subject to the court's express refusal to find that the rate of $75.00 will necessarily control all future fees in this case, if any, the court finds that $75.00 an hour is proper for the services herein. The court further finds that an award for 197 hours' legal work at this rate is entirely reasonable. Thus, plaintiffs' claim for $14,775.00 in legal fees is proper.

Plaintiff is also entitled to recover forty-eight hours travel time, at $10.00 an hour, expended in travel to and from the hearings set out in the attached appendix.

Moreover, plaintiffs' claim for the following expenses is hereby awarded:

Travel expenses to hearings set out in appendix	$1,800
Xerox, postage and telephone	100
Deposition costs	603
Total	$2,503.

Accordingly, it is

ORDERED that plaintiffs shall recover *pendente lite* attorneys' fees and expenses in the amount of $17,758.00.

SIGNED and ENTERED this *21st* day of July, 1977.

[William Wayne Justice]
United States District
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Fred Arispe Cruz, et al,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	Civil Action
	)	No. 71-H-1371
Dr. George J. Beto, et al,	)	
	)	
Defendants.	)	

ORDER

I. INTRODUCTION

Before the Court for consideration is plaintiffs' motion for approval of attorneys' fees. This Court, in its Memorandum and Order of June 14, 1976, ("June 14 Order") granted plaintiffs' application for counsel fees based on its earlier finding that defendants had displayed sufficient "bad faith," *see* Order on Findings of Fact and Conclusions of Law, at 3-5, 9, 15-16 & n. 9 (March 18, 1976) ("March 18 Order"), to warrant such an award. *See Carter v. Noble*, 526 F.2d 677, 678 (5th Cir. 1976). The parties' efforts to ascertain informally and agree to a reasonable attorneys' fee were not successful. Therefore, on November 29,1976, a hearing was conducted at which defendants were permitted to challenge the materials submitted by plaintiffs' counsel in support of the fee application. On the basis of the evidence submitted prior to and at the attorneys' fees hearing, the legal memoranda prepared by counsel and, most importantly, this Court's in-depth familiarity with the nature of the prosecution and defense which have

characterized this long-pending litigation, as previously detailed in the June 14 Order, at 1-4, the Court hereafter concludes that plaintiffs are entitled to attorneys' fees in the amount of $27,760.00.

II. ADDITIONAL BASIS FOR THE AWARD OF COUNSEL FEES

On October 19, 1976, President Ford signed into law the Civil Rights Attorney's Fees Awards Act of 1976, Public L. No. 94-559 (Oct. 19, 1976), *amending* 42 U.S.C. §1988. The new provision authorized the Court in its discretion to award the prevailing party in certain civil rights actions, including actions pursuant to 42 U.S.C. §1983, a reasonable attorney's fee as part of the costs. The statutory language tracks the language of counsel fee provisions in other civil rights statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).

As pointed out by counsel for plaintiffs, the legislative history clearly establishes that the new statute is applicable to cases pending as of the date of enactment. *See* H.R. REP. NO. 94-1558, 94th Cong., 2d Sess. 4 n.6 (1976); *of Bradley v. Richmond School Board*, 416 U.S. 696 (1974). Moreover, in accordance with the United States Supreme Court's recent decision in *Fitzpatrick v. Bitzer*, ___ U.S. ___ , 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the legislative history also reflects a Congressional intent to override the defense of sovereign immunity embodied in the Eleventh Amendment by exercising the enforcement power granted to Congress under Section 5 of the Fourteenth Amendment. *See* H.R. REP. NO. 94-1558, 94th Cong., 2d Sess. 7 & n.14 (1976); S. REP. NO. 94-1011, 94th Cong., 2d Sess. 5 (1976).

As stated in the Senate Report:

> "[D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)."

S. REP. NO. 94-1011, 94th Cong., 2d Sess. 5 (1976) (footnotes deleted). Thus, the scope of this new legislation, applicable to this cause of action, confirms the holding of this Court as stated in its June 14 Order as to the propriety of an award of fees.

III. DETERMINING A REASONABLE ATTORNEY'S FEE

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) (hereinafter "*Johnson*") is the guidepost by which an adequate fee award is to be fashioned in this prisoner civil rights case. *See Miller v. Carson*, 401 F. Supp. 835, 857-60 (M.D. Fla. 1975); H.R. REP. NO. 94-1558, 94th Cong., 2d Sess. 8 (1976); S. REP. NO. 94-1011, 94th Cong., 2d Sess. 6 (1976). This Court hereafter considers plaintiffs' fee application in accordance with the factors delineated in *Johnson*.

A. Time and Labor Required

1. Adequacy of Proof

Defendants primarily oppose plaintiffs' fee request on the grounds that plaintiffs' counsel have not submitted the documentation necessary to satisfy plaintiffs' "burden of proving their entitlement to an award of attorneys' fees". *Johnson, supra* at 720. To support the request, plaintiffs' attorneys have submitted affidavits

which detail the services rendered in representing plaintiffs, accompanied by counsel's estimates of the number of hours expended to perform such services, based upon a review of counsel's files, calendars and other bookkeeping records. *See* Plaintiffs' Exhibits 1-4. Plaintiffs' Exhibit 4, prepared one week prior to the November 29, 1976, fee hearing, contains a table which catalogues the hours expended by each attorney on the merits, both pre-trial and trial, as well as the time spent on the counsel fee issue.

According to lead counsel for plaintiffs, Mr. William Bennett Turner, the estimates of time expended are extremely conservative. In fact, at the fee hearing Mr. Turner stated that as he reviewed the file, he cut his initial estimate of hours for a particular service roughly in half for purposes of the affidavits. A comparison of the hours listed for certain services in counsel's affidavits and counsel's corresponding work product supports Mr. Turner's testimony.

Defendants, however, contend that plaintiffs have not presented ample evidence to support an award of fees because no daily time records have been submitted; the affidavits, aside from being based on estimates, do not state the date on which the service was performed and, in many cases, which of six attorneys representing plaintiffs performed the service; and there is no itemized expense schedule to support litigation-related expenses. In support of the argument that plaintiffs have failed to carry their burden of proof, defendants rely primarily on the Court's recent discussion in *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 689-693 (S.D. Tex. 1976) (hereinafter "*Foster*"), in which the Court delineated the methodology by which a reasonable attorneys' fee is to be determined when the proposed fee accompanies a pre-trial settlement of a Title VII class action. *See also Parker v. Matthews*, 411 F. Supp. 1059

(D.D.C. 1976). In *Foster*, this Court stated that before approving an attorney's fee to be awarded as part of a class compromise,

> "this court will expect a . . . detailed presentation which denotes the nature of the work performed, the exact amount of time spent on such work, and the exact date on which the work occurred."

Foster, supra at 690 n.10.

As pointed out to counsel at the attorneys' fees hearing, the circumstances surrounding plaintiffs' proposed fee in *Foster* bear little resemblance to the facts surrounding the instant fee application. Most important is the timing of the instant fee request as contrasted with that in *Foster*. In *Foster*, the Court was required to review the reasonableness of a proposed fee at a time when it possessed only scant knowledge of the case and had not had the opportunity to witness first-hand the results of the attorney's work effort at trial. Thus, because the Court had no basis for independently determining a fee based upon a time expenditure reasonably related to the services rendered, primary reliance necessarily was placed on counsel's itemization of services as a means of fashioning a reasonable fee award.

The instant case is at the opposite end of the spectrum. Here, the Court personally has observed the work effort of Mr. Turner, as lead counsel, and the other attorneys who have assisted him. The Court has become intimately familiar with this litigation during the past few years and the demands placed upon plaintiffs' counsel prior to trial stemming from defendants' tactical strategies. *See* June 14 Order, at 1-4. Thus, the Court is not primarily dependent upon supporting time

records of counsel, if any, as a means of assessing the correctness of the estimates contained in counsel's affidavits, but can rely chiefly on its own observations and experience in this particular litigation. *See Johnson, supra* at 717.

Furthermore, defendants apparently misconstrue the role of the Court in computing a reasonable fee. The Court is not required to calculate, nor are plaintiffs obligated to prove, a reasonable fee with "mathematical precision". *Johnson, supra* at 720. This is especially true where the need for documentation and specific listings of times and dates to support plaintiffs' request is at a minimum because of the Court's intimate acquaintance with the litigation. Rather, so long as the Court can reasonably ascertain, either on the basis of supporting time sheets or through its independent perception of counsel's efforts and abilities, that the hours claimed by counsel in their affidavits are a rational reflection of the services performed, the prevailing party will have fulfilled its burden of proof. Thus, although the preferable and less-risky course of action is for counsel to keep detailed time records to be submitted with a fee request, counsel's failure to do so is not fatal to plaintiffs' application in this particular case.

2. Analysis of Hours Claimed

According to Plaintiffs' Exhibit 4, at 3, plaintiffs seek an award of fees based on the following hourly totals:

Attorney	Trial & Fee Hearing	Pre-Trial Work on Merits & Fee Issue	Informal Communications	Total Hours
William Bennett Turner	17	187.8	20	224.8
Gabrielle McDonald	1	18.5		19.5
Mark McDonald		9		9
Alice Daniel		9	1	10

Samuel T. Biscoe	17	89.5	2	108.5
Shelvin Hall		44		44
TOTAL	35	357.8	23	415.8

Counsel have submitted supporting affidavits which list in adequate detail a chronological breakdown of services and the number of hours estimated to have been spent on each category of services.

In addition, the deposition of Mr. Turner, taken on November 18, 1976, (hereinafter "Turner deposition"), when coupled with the affidavits of Mr. Turner, Mrs. McDonald and Mr. Biscoe, offers a sufficient breakdown of hours spent by each attorney, as reflected in the above table. The tabular summarization accurately reflects the time allotments as listed in the affidavits and testified to by Mr. Turner.

The Court has no difficulty concluding that the hours claimed are reasonable and represent an efficient use of counsel's time. If anything, the hourly estimates appear unrealistically low. In certain instances counsel have opted to forego a recovery for time actually expended on the case. *See* Turner deposition, at 19, 22, 24, 26, 28. For example, Mrs. McDonald has listed only her time spent on purely legal work and has excluded time spent on informal communications and litigation-related conferences. *See* Plaintiffs' Exhibit 2, at 3. Additionally, Mr. Turner alludes to expenditures of time which he has not included in his itemization of services. *See* Turner deposition, at 24, 26. Thus, the Court finds no evidence of duplication of work effort for which a double recovery is sought or other evidence of "padding" on the part of plaintiffs' counsel.

Accordingly, the Court finds no reason to diminish the hours claimed by counsel, and defendants have not

pointed the Court to any category of services for which exessive time arguably is claimed. "The court simply notes that the strategy adopted by defendants added hours to plaintiffs' work," *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 683 (N.D. Cal. 1974), including time necessarily expended on the question of attorneys' fees in the absence of a settlement of this issue as urged by the Court in its June 14 Order, at 6-7. Therefore, the hours listed in the above table, including time spent on the attorneys' fees question, *see Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (5th Cir. 1971); *Foster, supra* at 692; *Parker v. Matthews*, 411 F. Supp. 1059, 1068 (D.D.C. 1976), will be used by the Court to compute a reasonable fee.

B. Rate of Compensation

In fashioning the hourly rate applicable to each of the six attorneys who performed legal services for the plaintiffs, the Court takes into account seven of the guidelines discussed in *Johnson, supra* at 718-19: the novelty and difficulty of the questions presented; the skill requisite to perform the legal service properly; the customary fee; whether the fee is fixed or contingent; the amount involved and the results obtained; the experience, reputation and ability of the attorneys; and the "undesirability" of the case.

All seven factors support higher hourly rates than customarily would be granted by this Court. Through the Findings of Fact and Conclusions of Law contained in the March 18 Order, this Court has described sufficiently the unusual and difficult nature of the instant case. Special skill was required of plaintiffs' counsel to combat the numerous legal roadblocks set up by defendants and to deal with the burdensome discovery effort mounted by the defendants late in the pre-trial stage of this controversy. At all times, counsel

displayed an extremely high level of expertise in the pertinent subject areas. As a result of counsel's efforts, plaintiffs were awarded monetary damages against defendant Beto, the former Director of the Texas Department of Corrections, and granted injunctive relief. Because of the important constitutional questions at stake, the damage recovery constitutes merely incidental relief. Thus, the amount of monetary damages awarded in this case will not be viewed as limiting the amount in attorneys' fees properly recoverable by plaintiffs. *See, e.g., Miller v. Carson*, 401 F. Supp. 835, 859-60 (M.D. Fla. 1975); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 484 (S.D.N.Y. 1970), *aff'd*, 449 F.2d 51 (2nd Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973). All the factors listed above have been considered in arriving at the hourly rates delineated below.

Lead counsel, Mr. Turner, is one of the leading authorities and practitioners in the field of prisoner civil rights litigation. Since 1970, he has served as Director of the NAACP Legal Defense Fund at its San Francisco office. His affidavit, Plaintiffs' Exhibit 1, lists the landmark litigation previously handled by him, as well as his numerous publications, including two textbooks. Based upon his background and experience, Mr. Turner clearly is entitled to a top hourly fee which properly is awardable for work in this legal area. Accordingly, this Court determines that Mr. Turner's time should be valued as follows: $90 per hour for trial work; $75 per hour for pre-trial work; and $35 per hour for informal communications.

Gabrielle McDonald and Mark McDonald are civil rights practitioners in Houston, Texas, who specialize in Title VII employment discrimination actions. As indicated by the number of hours spent by each of them on this case, *see* Part III.B.2., *supra*, and the affidavit of

Mr. Turner, Plaintiffs' Exhibit 1, at 4, it is clear that the McDonalds' chief role was to serve as local counsel and assist Mr. Turner in his prosecution of the suit from his offices in San Francisco, California. Given the nature of the legal services performed by them in this litigation, coupled with their legal background and experience, the Court concludes that their services should be compensated at the rate of $70 per hour for trial work and $60 per hour for pre-trial work.

Alice Daniel initially handled the case for the NAACP Legal Defense Fund. She consulted with the plaintiffs, negotiated with the Texas Attorney General's office regarding plaintiff's allegations and played the major role in the preparation of the original complaint and motion for preliminary injunction. Plaintiffs' Exhibit 1, at 2. The case was thereupon turned over to Mr. Turner. Given Ms. Daniel's legal background, as summarized in Plaintiffs' Exhibit 1, at 3-4, her hourly fee is approximately set at $60 per hour for her pre-trial work and $35 per hour for time spent on informal communications.

Samuel Biscoe has acted as Mr. Turner's associate in the case from the summer of 1973 through the present time. Mr. Biscoe assisted Mr. Turner in deposing and interviewing the inmate plaintiffs, and in the preparing for and conducting of trial. Given that Mr. Biscoe graduated from law school in 1973, the Court determines that his time should be compensated at the rate of $50 per hour during trial, $40 per hour before trial and $35 per hour for informal communications. Similarly, the Court concludes that Ms. Shelvin Hall who, as an associate in the office of Mark and Gabrielle McDonald, prepared for and attended depositions of the inmate plaintiffs as plaintiffs' representative, also should be compensated at $40 per hour for her pre-trial work. Finally, the travel time of Mr. Turner and Mr.

Biscoe will be valued at $10 per hour.

Again, the Court stresses that the hourly fees herein delineated have been fashioned on the basis of counsel's qualifications, their work effort and the results obtained through such efforts, as well as the difficulty and novelty of the case. The subjective factors which properly should be considered by the Court in determining a reasonable fee, *see Johnson v. Georgia Highway Express, Inc., supra*, thus have been considered fully in arriving at the hourly rates. Accordingly, the Court need not adjust the resultant hours-times-rate figures since all factors have been considered in determining the applicable hourly fees.

The rates utilized in this case undoubtedly represent the maximum hourly fees which this Court will employ in fashioning fee awards for litigation of this nature. However, given the expertise and quality of work exhibited by counsel, the rates are entirely reasonable.

C. Conclusion

Therefore, on the basis of the affidavits of counsel, the evidence forthcoming at the November 29 hearing and this Court's independent observation of counsel's performance, the Court concludes that plaintiffs are entitled to an attorney's fee computed as follows:

Attorney	Trial & Fee Hearing	Pre-Trial Work on Merits & Fee Issue	Informal Communications	Total Hours
William Bennett Turner	17 x $90	187.8 x $75	20 x $35 =	$16,315.00
Gabrielle McDonald	1 x $70	18.5 x $60	=	1,180.00
Mark McDonald		9 x $60	=	540.00
Alice Daniel		9 x $60	1 x $35 =	575.00
Samuel T. Biscoe	17 x $50	89.5 x $40	2 x $35 =	4,500.00
Shelvin Hall		44 x $40	=	1,760.00
SUB-TOTAL				$24,870.00

PLUS:

1. Travel Expenses (see Plaintiffs' Exhibit 1 at 5; Plaintiffs' Exhibit 4, at 4)

Mr. Turner:	5 round trips at $350/each =	$1,750	
Mr. Biscoe:	Approximation based on exhibits	400	
			$ 2,150.00

2. Travel Time (see Plaintiffs' Exhibit 1, at 4-6; Plaintiffs' Exhibit 4, at 4)

Mr. Turner:	5 round trips at 8 hrs. each at $10/hr. =	$ 400	
Mr. Biscoe:	34 hrs. at $10/hr.	340	
			$ 740.00

TOTAL $27,760.00

Plaintiffs shall also recover their court costs of $65.00 from defendants.

DONE at Houston, Texas, this 3rd day of March, 1977.

Carl O. Bue, Jr.
United States District Judge